90-1027

No. 90-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1990

HELEN JEAN GUERCIO,

Petitioner,

v.

GEORGE BRODY

and

JOHN FEIKENS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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December 1990

QUESTIONS PRESENTED

1. Can a federal judge seeking qualified immunity reasonably conclude that certain speech is not protected when that speech consists of a public employee's distribution of newspaper articles published eleven years previously containing information highly relevant to the current qualifications of an attorney nominated amidst public controversy to replace a disgraced judge in a corrupted federal court?

2. Can a federal judge faced with (1) a competent and loyal secretary's protected speech on a matter of grave public concern, and (2) a judge-nominee's tempermental threat not to work with that judge unless he fires the secretary for her protected speech, reasonably conclude that the integrity and efficiency of the federal judiciary would be furthered by acquiescing in the threat and firing the secretary?

3. May a federal court of appeals, ruling upon the allegations of an unanswered complaint, base its determination of qualified immunity upon a plain misstatement of material factual allegations, upon inferences contrary to specific factual allegations, and upon inferences favoring the defendant judges rather than the plaintiff public employee?

PARTIES TO THE PROCEEDING

The following parties appeared before the United States Court of Appeals for the Sixth Circuit:

1. Petitioner:
   Helen Jean Guercio

2. Respondents:
   George Brody
   John Feikens

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Helen Jean Guercio petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in this case on August 13, 1990 and September 25, 1990.

OPINIONS BELOW

The order of the Court of Appeals denying Helen Guercio's petition for rehearing and suggestion for rehearing *en banc* (App., **infra**, 1a) is reported at __ F.2d ___ (6th Cir. 1990). The opinion of the Court of Appeals (App., **infra**, 3a) is reported at ___ F.2d ____ (6th Cir. 1990). The opinion and order of the district court appealed to the Court of Appeals (App., **infra**, 30a) are unreported.

This case has generated other reports of opinions not germane to the present petition. Petitioner's claim had originally been dismissed on absolute immunity grounds by the district court in proceedings on July 10, 1985 and in an unreported order of August 6, 1985 (App., **infra**, 43a). That dismissal was reversed by decision of the Court of Appeals (App., **infra**, 49a), reported at 814 F.2d 1115 (6th Cir. 1987). That decision was originally vacated in part by order (App., **infra**, 60a), reported at 823 F.2d 166 (6th Cir. 1987), but subsequently reinstated by order (App., **infra**, 63a) reported at 859 F.2d 1232 (6th Cir. 1988). The denial of George Brody's petition for writ of certiorari on the question of absolute immunity is reported at 484 U.S. 1025 (1989).

The Federal Circuit denied jurisdiction of an appeal by respondent Brody in an opinion (App., **infra**, 65a) reported at 884 F.2d 1372 (Fed.Cir. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1990. A timely petition for rehearing was denied on September 25, 1990 (App., **infra**, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

The factual record in this case is limited to the facts alleged in an amended complaint filed by petitioner in the district court in June 1988 (App., **infra**, 69a). On the basis of the unanswered factual allegations of petitioner, the court of appeals held that respondent judges were entitled to qualified immunity. Those facts are as follows.

Beginning in 1979, Helen Guercio was employed for close to three years by Detroit Bankruptcy Judge George Brody as his legal secretary, performing in a competent and professional manner, fully recognized by Judge Brody (Second Amended Complaint, App., **infra**, 70a, paras. 6-7). In late 1979, Mrs. Guercio discovered evidence of corruption in the Bankruptcy Court (App., **infra**, 71a, paras. 8-9), and informed both Judge Brody and the Chief Judge of the District Court, John Feikens, both of whom refused at the time, and for some ten months thereafter, to act on the information disclosed to them by Mrs. Guercio (App., **infra**, 71a-72a, paras. 10-12).

Mrs. Guercio persisted in her efforts to expose corruption in the Bankruptcy Court, reporting her information in

May 1980 to appropriate personnel in the Administrative Office of the United States Courts ("AO"), in Washington, D.C. She was, however, informed that respondent Judge Feikens refused consent to an AO investigation of the corruption observed and revealed by Mrs. Guercio (App., **infra**, 71a-72a, para. 11). In October 1980, Judge Feikens finally consented to an AO investigation, and from October 1980 through June 1981, Mrs. Guercio cooperated in the investigation, disclosing information which led to the resignation of a Bankruptcy Judge and the criminal convictions of an attorney, a clerk, and the Chief Clerk of the Bankruptcy Court (App., **infra**, 72a-73a, para. 15).

In the summer of 1981, shortly after the resignation of Bankruptcy Judge Harry G. Hackett pursuant to Mrs. Guercio's exposure of corruption, a committee of federal district court judges nominated George Woods to replace Judge Hackett. That nomination generated public controversy, was widely criticized and defended, and was the subject of extensive media coverage (App., **infra**, 73a, para. 17). Mrs. Guercio learned that nominee Woods had eleven years previously, in 1969, been nominated to become the United States Attorney, but his nomination had been withdrawn after critical publicity regarding his representation of, and contacts with, reputed organized crime or racketeering figures (App., **infra**, 73a, para. 19). Mrs. Guercio disclosed this information to the nominating committee and to others during the period Woods was under consideration for appointment to the Bankruptcy Court (App., **infra**, 74a, para. 20). The information disclosed by Mrs. Guercio consisted of newspapers articles published in 1969 describing the previous Woods nomination controversy.

There is no allegation, nor anything in the record, indicating that Woods' previous failed nomination, or the circumstances and 1969 publicity surrounding it, had ever been investigated by, or was even known to, those with nominating, reviewing or selecting authority regarding nominee Woods. Moreover, Mrs. Guercio distributed the information while the Woods' nomination was still under consideration.

Soon after Mrs. Guercio's distribution of the 1969 newspaper articles, nominee Woods informed Judge Brody that because Mrs. Guercio had distributed information about Woods' prior failed nomination, he would, if appointed, refuse to work with Judge Brody unless Judge Brody fired Mrs. Guercio (App., **infra**, 74a, para. 21). Judge Brody took nominee Woods' threat to Judge Feikens, who demanded that she be fired (App., **infra**, 74a, paras. 21, 23). Judges Brody and Feikens fired Mrs. Guercio on October 16, 1981. Mrs. Guercio's complaint asserts that she was fired because of her successful efforts in exposing corruption and her distribution of the information concerning nominee Woods.

Judges Brody and Feikens were not motivated in firing Mrs. Guercio by any existing disruption or disharmony created by her disclosures (App., **infra**, 75a, para. 27). They fired her solely in retaliation for her exposure of corruption in their court and her embarrassing disclosures regarding the new nominee, which had caused the nominee to threaten that he would himself create disruption unless the judges met his demand that they retaliate against Mrs. Guercio.

Mrs. Guercio's disclosures regarding corruption had not resulted in disrupting her work on Judge Brody's staff, nor had any disruption occurred in the work of the new Judge since he had not yet been appointed at the time Mrs. Guercio was fired (App., **infra**, 75a, para. 26). At no time had Mrs. Guercio criticized Judge Brody or Judge Feikens, nor had she ever personally criticized Judge-nominee Woods. Her activities concerning Woods were limited solely to disclosures of newspaper articles containing information relevant to the concerns of a nominating committee (App., **infra**, 74a, para. 25).

Mrs. Guercio originally filed her claim that she had been fired in violation of her First Amendment rights to speak out on matters of public concern against Judges Brody and Feikens, in their personal and official capacities, seeking damages from them personally, and equitable reinstatement by them in their official

capacity. The district court dismissed her entire amended complaint solely on the grounds of absolute immunity. The Court of Appeals for the Sixth Circuit reversed this dismissal and the judges then moved separately for dismissal on grounds of qualified immunity, which motions the district court denied. Judge Feikens appealed his denial to the Court of Appeals for the Sixth Circuit; Judge Brody appealed his denial to both the Court of Appeals for the Federal Circuit and the Court of Appeals for the Sixth Circuit. The federal circuit refused jurisdiction, and the sixth circuit heard and decided both appeals as one.

The Court of Appeals for the Sixth Circuit, by a two-to-one panel decision held both judges were entitled to qualified immunity, reversed the denial of the judges' motion to dismiss them as defendants in their personal capacity and remanded to determine whether any equitable claims against them in their official capacity remained. The parties have stipulated to dismiss all claims against the respondents in their official capacity.

The panel's majority opinion concedes that a reasonable federal judge could not have failed to recognize that Mrs. Guercio could not constitutionally be fired under the circumstances "up to the point at which Guercio circulated the dated news articles critical of Woods" (App., **infra**, 16a). However, the majority held a reasonable judge could conclude Mrs. Guercio's disclosure of the eleven-year-old articles was not protected speech (App., **infra**, 16a,22a). The majority panel further concluded that, given the "central and indispensable" concern for harmony and collegiality among judges (App., **infra**, 20a), a reasonable judge could determine it would be constitutionally appropriate to fire Mrs. Guercio in the face of a nominee's "bitter resentment" and threat to refuse to work with Judge Brody if Mrs. Guercio were not fired (App., **infra**, 15a).

Mrs. Guercio sought rehearing from the court of appeals on the dismissal of her *Bivens*[1] claims against the judges in their personal capacity, which was denied, leading to this petition.

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[1] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

REASONS FOR GRANTING THIS PETITION

I.
QUESTIONS OF EXCEPTIONAL IMPORTANCE ARE PRESENTED

This case arises from what the court of appeals has characterized as an "unfortunate chapter" of court corruption in the Eastern District of Michigan, a chapter that generated intense public interest and media scrutiny. Helen Guercio, the court employee who exposed the corruption, was never promoted, rewarded or otherwise recognized by the court for her efforts. Instead, she was fired while the court was still attempting to correct itself and while its efforts were still the subject of intense public and media interest, scrutiny and controversy.

Because this case arises from a corrupted federal court and because it involves the extent to which judges are immune from the consequences of their unconstitutional conduct, Mrs. Guercio's complaint of retaliatory firing presents issues of exceptional importance.

The course of litigation in this case presents a further indication of the importance of the questions presented. Her complaint has been before the Court of Appeals for the Sixth Circuit twice and before the Court of Appeals for the Federal Circuit once (App., **infra**, 3a, 49a, 65a). Further, the Court of Appeals for the Sixth Circuit, at defendant Feikens' request, granted and then vacated rehearing *en banc* in the previous appeal. Mrs. Guercio's complaint, which has been the subject of scholarly and media attention,[2] presents "very difficult" questions (App., **infra**, 26a) which, in a third appearance before a Court of Appeals, with Mrs. Guercio as appellee, generated a decision with majority and dissenting opinions (**Id.**).

Apart from the importance which the questions presented

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[2]Cf., Robert S. Glazier, "An Argument Against Judicial Immunity for Employment Decisions," 11 Nova Law Review 1127 (1987).

assume because of the history of and public and scholarly interest in this case and the events surrounding it, the questions presented are of exceptional public importance, because of the difficulty and extraordinary character of the developing federal common law doctrine of immunity for judges and public officials. In holding the judges immune from the consequences of their retaliation, the panel's majority opinion misapplies a *Pickering* balancing test to an unanswered complaint, and has to rely on inferences which are either not available or favor the defendants rather than plaintiff.

In its unique finding of qualified immunity on the part of judges who have yet to even deny the detailed allegations of a complaint which states a *Bivens* cause of action, the panel's majority opinion effectively reinstates absolute immunity and creates a vast gulf between judges and public officials on the one hand and the rest of society on the other. While all other citizens, no matter how important their decisions might be to the proper functioning of society, must answer to the judiciary for their actions, judges are to be exempted from even denying detailed charges of First Amendment violations, even where their actions are administrative rather than judicial.

Given that this is a case against judges and arises out of events occurring in a once-corrupt federal court, the question to what extent the judiciary branch exempts itself from constitutional burdens it has placed upon the rest of society is one of extreme importance.

II.
ANY REASONABLE JUDGE WOULD RECOGNIZE THAT MRS. GUERCIO'S SPEECH WAS ENTITLED TO SPECIAL PROTECTION. NO REASONABLE JUDGE WOULD HAVE ACQUIESCED IN THE FACE OF NOMINEE WOODS' EXTRAORDINARY THREAT.

The Court of Appeals for the Sixth Circuit has concluded that "a competent judge in the position of Judge Feikens could have reasonably...questioned if the circulation of the dated news accounts constituted an expression of speech protected by the first amendment" (App., **infra**, 20a). In so concluding, the majority decision evinces a distressingly low opinion of the ordinary, prudent federal judge's competence.

Nominee Woods was to replace a disgraced judge in a corrupted court. The nominee had, eleven years previously, had his nomination to high public office withdrawn during a much publicized controversy over his being ethically qualified for high public office. Nothing in the record before the court of appeals indicates that those charged with deciding upon the nomination were aware of the former controversy or knowledgeable as to the underlying facts. Nor was anything in the record before the court as to the already aroused public's knowledge as to the ethical concerns raised eleven years previously. The court fails to note the great relevance of the previous controversy to that arising eleven years later. The court limits its characterization of Mrs. Guercio's speech as being "circulation of dated news accounts."

No reasonable federal judge could question whether such speech was an expression of speech protected by the First Amendment. Any competent federal judge would recognize that speech on public issues occupies "the highest rung of the hierarchy of First Amendment values." *NAACP v. Clairborne Hardware*, 458 U.S. 886, 913 (1982). It is beyond argument that the nominee's background and qualifications were a matter of grave public concern. And public scrutiny thereof, not just in-house judge scrutiny, was also of grave public concern and

essential to restoring public confidence in the corrupted court. No reasonable judge would fail to recognize Mrs. Guercio had a claim of great protection. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Meyers*, 461 U.S. 138 (1983).

The majority opinion of the court of appeals next asserts that a reasonable federal judge might acquiesce in a firing otherwise unconstitutional because of the extraordinary threat of a nominee that, if appointed, he would not work with a fellow judge. The majority concedes that bankruptcy judges working together was a "central and indispensable" concern, yet concludes it would be reasonable to allow an incoming nominee to threaten not to work with another judge. The majority fails to explain how the efficiency of the service is furthered by acceding to a threat to create disruption if demands for retaliation against protected speech are not met.

Petitioner asserts that no reasonable judge would have fired Mrs. Guercio on the basis of nominee Woods' threat. The only reasonable response under the circumstances presented by Mrs. Guercio's complaint would be to explain to nominee Woods that he should expect and welcome public scrutiny of his prior failed nomination, that such public scrutiny was important to restoring public confidence, that public employees were entitled to forward or publicize any information concerning his background, particularly where they refrained from personal criticism. Any reasonable judge would further explain that to refuse to work with another judge would be highly improper and would be a violation of one's oath of office. And, finally, any reasonable judge would have refused to fire a competent secretary under such circumstances.

No reasonable judge would fail to recognize that the true source of threatened disruption was nominee Woods, not Mrs. Guercio's distribution of the highly relevant information contained in old newspaper articles. The harmony obtained by placating an unconfirmed nominee making a threat that, if carried out, would constitute a violation of a judge's oath of office, is not the type of harmony that promotes the efficiency of

the judiciary branch. If it is not constitutional for one judge to fire a public employee for protected speech, it does not become so when a second judge threatens not to work unless the first judge does fire her for that speech.

By any objective measure Mrs. Guercio's rights to free speech were so evident from pre-existing law when she was ordered fired by Judge Feikens that he was under an affirmative duty to refrain from such conduct. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987). To conclude otherwise would be to authorize third party threats of disruption as an effective and constitutionally permissible tool to silence public employees from speaking out on matters of grave public concern.

III.
THE COURT BELOW COMMITS WHOLESALE VIOLATION OF ITS DUTY TO RELY EXCLUSIVELY UPON THE ALLEGATIONS OF THE COMPLAINT.

The majority opinion misstates the factual allegations of the complaint, infers facts contrary to those alleged, and repeatedly chooses inferences favoring defendant-respondents rather than the plaintiff-petitioner. In doing so, the court violates the requirement to decide issues of law exclusively on the allegations of the unanswered complaint, which, having not been denied, must be accepted as true. *See, Hishon v. King and Spaulding*, 467 U.S. 69, 73 (1989); *Walker Process Equipment, Inc. v. Food Machinery and Chemical*, 382 U.S. 172, 174-175 (1965).

1. Misstatement of fact.

In holding a competent federal judge could reasonably conclude Mrs. Guercio's distribution of information concerning Judge Woods' qualifications was not protected speech, the majority opinion asserts that there existed "disharmony precipitated by Guercio's distribution of dated news articles, which disharmony Guercio has conceded affected to some degree the operation of the Bankruptcy Court..." (App., infra, 19a). This assertion is a plain misstatement of the pertinent allegations in Mrs. Guercio's complaint:

> Plaintiff's distribution of the newspaper articles *had not caused any disruption* in her performance of her duties or her ability to work with others in the course of performing her duties.... With respect to Woods, *no disruption* of the workplace could have occurred, since Woods' nomination was still pending....

(App., **infra**, 75a, para. 26 [emphases added].) The majority opinion thus mistakenly matches allegations of "minor" disruption from earlier exposures of corruption with the totally unconnected later distribution of information concerning nominee Woods, thereby mistakenly concluding her distribution had "affected to some degree the operation of the Bankruptcy Court" (App., **infra**, 19a).

Mrs. Guercio has asserted exactly the opposite. Woods had not been appointed. His nomination was publicly controversial even before Mrs. Guercio distributed her information. And nothing in the record indicates that the operation of the Bankruptcy Court was actually affected in any manner whatsoever. Thus, in its attempt to apply a *Pickering* balancing test to Mrs. Guercio's unanswered allegations, the court improperly assumes existing disruption which in fact was alleged *not* to exist.

2. Assumption of fact not in the record.

The majority opinion erroneously assumes knowledge of Judge Feikens' subjective motivations, an assumption not justified by the record and not appropriate to a determination of objectively reasonable conduct by a Chief Judge exercising authority over personnel decisions. The opinion asserts "Judge Feikens' desire to prevent [internecine] conflict was both genuine and compelling" (App., **infra**, 15a). Nothing in the record evidences Judge Feikens' subjective desires. And, given his initial ten-month refusal to act on information evidencing corruption, and his acquiescence in an unseemly threat by a nominee, inferences favoring Judge Feikens should only be drawn where compelled by the factual allegations of the complaint.

3. Misstatement of fact; assumption of facts not in the record.

The majority opinion asserts that the appointive procedures "had been exhausted to completion" when Mrs. Guercio distributed her information concerning Woods' previous nomination problems (App., **infra**, 19a). The majority opinion then, remarkably, concludes that since the newspaper articles were "of public record" and since there was nothing "newly discovered" and Mrs. Guercio didn't attest to the articles' accuracy, that a competent federal Chief Judge could conclude her speech was unprotected (**Id.**)

There is nothing in the record justifying the assertion that the appointive process was "exhausted to completion." The complaint alleges, to the contrary, that the nomination was still "under consideration" (App., **infra**, 74a, para. 22). There is nothing in the complaint or record to indicate anyone in the nominative and appointive process was aware of, or had investigated the information distributed by Mrs. Guercio. There is no evidence of any public scrutiny of nominee Woods' previous failed nomination. Such public scrutiny would be important to restoring public confidence. Thus, again, the majority opinion assumes facts not before the panel and relies on those facts improperly to choose inferences favorable to Judge Feikens.

4. Assumption of fact not in the record.

The majority improperly infers that the effort to restore integrity was "progressing expeditiously and effectively" (App., **infra**, 17a), despite the allegations that the nomination of Woods was controversial and criticized from the start, and despite the absence of any fact upon which to infer that nominee Woods' prior nomination difficulties had been investigated at all. A public airing of nominee Woods' previous difficulties was certainly appropriate to a corrupted court's efforts to restore itself, and nominee Woods' "bitter resentment" (App., **infra**,

20a) over a public airing, together with the already existing controversy and criticism of his nomination for other reasons, afford little basis for the majority opinion's assumptions that everything was fine until Mrs. Guercio distributed her information.

5. Misstatement of fact.

The majority opinion mischaracterizes Judge Feikens' ten-month refusal to do anything with Mrs. Guercio's corruption information as a mere withholding of "formal" action (App., **infra**, 16a): "Although both Judge Feikens and the Administrative Office of the United States Courts initially withheld formal action..." (**Id.**). There is nothing in the record indicating *any* action, formal or informal, and Mrs. Guercio indeed alleged, on information and belief, that Judge Feikens refused to consent to any action by the Administrative Office. The opinion thus erroneously robs Mrs. Guercio of the permissible inference that a judge, who does nothing with evidence of corruption for some ten months, until Mrs. Guercio has taken her proof to so many places that investigation and publicity were inevitable, might well be motivated by something other than the nonexistent "disruption" of operations improperly assumed by the court.

The court's repeated assumption of facts not in the record and repeated reliance on inferences not properly available on a motion to dismiss for failure to state a claim skews the majority opinion's conclusions as to what a reasonable judge would have done when faced with the threat of a nominee not to work with other judges unless his demands are met. This problem underlies the majority's entire attempt to balance the public interest in efficiency and integrity against Mrs. Guercio's rights to speak out on matters of grave concern.

The majority opinion, having no facts in the complaint to justify a reasonable judge acceding to a nominee's outrageous threat, has improperly assumed facts which would begin to tilt

the scale of reasonableness towards respondents. There are no facts concerning morale levels, about the seriousness of Woods' temper tantrum, about disruption having occurred, about the probabilities of "potential" disruption. In the absence of such facts, a *Pickering* balancing test, applied to the detailed allegations of an unanswered complaint, cannot raise the respondent judges' conduct to that of a reasonable federal judge.

CONCLUSION

Based on the foregoing, this Court should issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the final judgment by that court.

Respectfully submitted,

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December 1990

No. 88-2013/89-1137

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HELEN J. GUERCIO, Plaintiff-Appellee,	)	
v.	)	ORDER
GEORGE BRODY, Defendant-Appellant (88-2013), Defendant (89-1137),	)	
JOHN FEIKENS, Defendant (88-2013) Defendant-Appellant (89-1137)	)	

BEFORE: KRUPANSKY and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

88-2013/89-1137

HELEN J. GUERCIO,

Plaintiff-Appellant,
v.
GEORGE BRODY (88 2013),
JOHN FEIKENS (89-1137),
Defendants-Appellants.

Before: KRUPANSKY and WELLFORD, Circuit Judge; and CELEBREZZE, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same hereby reversed and the case is remanded for adjudication of Plaintiff's remaining equitable claims for relief.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Issued as Mandate: October 4, 1990 A True Copy.

(88-2013) (89-1137)

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

Nos. 88-2013/89-1137

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HELEN J. GUERCIO,
Plaintiff-Appellee,

v.

GEORGE BRODY (88-2013)
and JOHN FEIKENS (89-1137),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed August 13, 1990

Before: KRUPANSKY and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

KRUPANSKY, Circuit Judge, delivered the opinion of the court, in which CELEBREZZE, Senior Circuit Judge, joined. WELLFORD, Circuit Judge, (pp. 24-27) delivered a separate opinion concurring in part and dissenting in part.

KRUPANSKY, Circuit Judge. Defendants-appellants, George Brody (Brody) and John Feikens (Feikens) (collectively, appellants), appeal the denial of their motion to dismiss plaintiff-appellee Helen Guercio's (Guercio) complaint on the basis of qualified official immunity. The facts of this controversy were set out previously and the reader is referred

to the circuit's previous opinion for a full rendition. *Guercio v. Brody,* 814 F.2d 1115 (6th Cir. 1987) (*Guercio I*).

In summary, Guercio, who had been discharged from her position as confidential secretary to then Bankruptcy Judge Brody, commenced this action against him and District Judge Feikens, formerly Chief Judge of the United States District Court for the Eastern District of Michigan, for wrongful termination of her employment in alleged violation of her constitutional right to free speech. Guercio asserted a cause of action arising under *Bivens v. Six Unknown Agents,* 403 U.S. 388 (1971), and sought injunctive relief, declaratory relief, equitable relief, and monetary damages. Specifically, Guercio prayed in her second amended complaint for a declaration that her termination was unconstitutional, for an injunction ordering her reinstatement to the same or a similar position, for backpay and accrued benefits up to $9,999.00,[1] and for damages in the amount of $1 million from Feikens and Brody jointly and severally in their individual capacities.

This circuit's opinion in *Guercio I* related the following factual scenario:

> The facts of this case, as alleged in the complaint and affidavits of record, lead us through an unfortunate chapter in the history of the U.S. Bankruptcy Court for the Eastern District of Michigan — a period in which Ms. Guercio asserts that she played

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[1]The United States District Courts have jurisdiction over claims against the United States for monetary relief of less than $10,000 pursuant to the Little Tucker Act, 28 U.S.C. § 1346(a)(2). Appeals from such actions, however, lie only in the Federal Circuit. 28 U.S.C. § 1295(a)(2); *United States v. Hohri,* 482 U.S. 64 (1987). The Federal Circuit has determined that Guercio's second amended complaint *does not* state a claim under the Little Tucker Act. *Guercio v. Brody,* 884 F.2d 1372 (Fed. Cir. 1989). Therefore, this court, and not the Federal Circuit, has jurisdiction over this appeal.

a central role in exposing corruption in the Bankruptcy Court.

According to the allegations, Guercio was hired in January 1979 by Judge Brody to serve as his secretary. From October 1979 through June 1981, Guercio made various disclosures concerning corruption in the Bankruptcy Court. She revealed, for example, that the Bankruptcy Court's system of random case assignments was being manipulated. These disclosures eventually led to the resignation of a bankruptcy judge as well as the criminal convictions of an attorney and bankruptcy court clerk.

As part of this chain of events resulting from her disclosures, Guercio alleges that the Judicial Council of the Sixth Circuit intervened and placed the Bankruptcy Court in virtual receivership. The Judicial Council stated in an order dated May 6, 1981:

> The Council concludes that the effective and expeditious administration of the business of the courts within this circuit requires that the administration of the Bankruptcy Court for the Eastern District of Michigan be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision should include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court.

By an order of May 18, 1981, the judges of the U.S. District Court for the Eastern District of Michigan directed Chief Judge Feikens to assume supervisory responsibility for the Bankruptcy Court pursuant to

> the earlier order of the Judicial Council of the Sixth Circuit.

Guercio I, 814 F.2d at 1116.

The record further discloses that the resignation of one of the bankruptcy judges who had been affected by the disclosures of corruption compelled the nomination of a replacement, and that George Woods (Woods) was nomiated to fill the position. Subsequent to the announcement of the Woods nomination, but prior to his confirmation, Guercio amassed and circulated "to the press and others" newspaper articles that had originally appeared approximately eleven years earlier in connection with Woods's 1969 nomination for United States Attorney for the Eastern District. *Id.* The newspaper articles apparently discussed Woods's purported legal representation of reputed organized crime figures during an earlier stage of his career. According to the complaint, Woods took umbrage with Guercio's disclosures and threatened Brody with withholding his "cooperation" should he be confirmed as a bankruptcy judge. Brody, in turn, reported his dilemma to Chief Judge Feikens, who, allegedly, instructed Brody to discharge Guercio.

The district court originally granted both judges absolute immunity from suit, reasoning that the decision to discharge Guercio was undertaken in a judicial capacity. Another panel of this court reversed that determination in *Guercio I*, finding that Guercio's termination was in the nature of a ministerial or administrative act, as opposed to the type of judicial function traditionally accorded absolute immunity, *Guercio I*, 814 F.2d at 1119-20, and remanded the action to the district court, expressing no opinion as to the judges' entitlement to the protection of qualified immunity. *Id.* at 1120. Subsequently, the full court granted rehearing en banc to consider the question of absolute immunity insofar as it applied to Chief Judge Feikens. *Guercio v. Brody*, 823 F.2d 166 (6th Cir. 1987). Prior to rehearing en banc, however, the Supreme

Court announced its opinion in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538 (1988). In response to *Forrester*, this circuit vacated its order granting rehearing en banc, reinstated its previous mandate (rendered in *Guercio I*) relative to Judge Feikens, and remanded the entire matter to the district court in order to "consider the entire case in light of the Supreme Court's decision in *Forrester v. White* and consider the remaining issues in light of *Forrester v. White* and this court's reinstated decision of April 1, 1987." *Guercio v. Brody*, 859 F.2d 1232, 1233 (6th Cir. 1988).

While the language of this last mandate would seem to suggest that the district court on remand was to reevaluate the propriety of granting *absolute* immunity in light of *Forrester v. White*, it is difficult to reconcile that suggestion with the court's "reinstatement" of its first opinion in *Guercio I*, which unequivocally denied the availability of absolute immunity for the act in question. The panel's decision in *Guercio I* is the law of this case, and both judges were, accordingly, foreclosed from asserting absolute judicial immunity as a defense against Guercio's charges in future proceedings.[2]

The sole remaining question, then, is whether the district court erred on remand in denying the judge's motions for dismissal, which motions were premised on a defense of qualified immunity. Resolution of this issue hinges entirely upon an accurate and comprehensive analysis of the qualified immunity test as it has been pronounced and applied in the opinions of the Supreme Court and this court, and applica-

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[2]The possibility that this court desired the district court to reconsider the absolute immunity issue in light of *Forrester* is belied to a large degree by *Forrester*'s unequivocal holding that judges are not entitled to absolute immunity from suit for actions arising out of personnel decisions. *Forrester*, 484 U.S. at 229-30, 108 S.Ct. at 545-46. Thus, although the language of the court's mandate in *Guercio I* is unclear, further consideration of absolute immunity is foreclosed by the *Forrester* rationale.

tion of that test to the facts of the case at bar as they are portrayed in Guercio's second amended complaint.

In the seminal case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court declared that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Ad hoc application of the *Harlow* test in the context of the facts of this particular case requires, at the threshold, examination of Guercio's complaint for a precise understanding of what she alleged to have occurred in the course of events leading to her discharge. Her complaint pleads a single cause of action summarized in paragraphs 24 and 31 as follows:

> 24. Defendants Feikens and Brody were motivated to effect and did effect plaintiff's termination solely because of her participation in exposing corruption in the Bankruptcy Court and her distribution of the 1969 newspaper articles critical of the nominee who was being considered to replace the judge whose corruption had been exposed by plaintiff. At all times relevant herein, defendants were aware of plaintiff's participation in exposing corruption in the court and of her distribution of articles relevant to the Woods nomination.
>
> 31. By denying plaintiff her rights under the First Amendment to speak on matters of public concern, defendants Feikens and Brody deprived plaintiff of her rights and privileges secured by the Constitution . . . .

In sum, in her single cause of action Guercio recited a continuous course of conduct commenced in December of 1979, ultimately resulting in her discharge in October of 1981.

Guercio's activities as Judge Brody's secretary and as a disseminator of matters of ostensible public interest are best viewed on a continuum, starting with her initial employment in 1979, her disclosures about corruption in the bankruptcy court, and concluding with her circulation of the 1969 newspaper accounts as a commentary on Woods's fitness for the office to which he had been nominated.

The motion to dismiss invoking the doctrine of qualified immunity filed by Judge Feikens because his "conduct did not violate any right so clearly established that all reasonable [Judges] would know they were under an affirmative duty to refrain from such conduct" joins issues of law to be decided by the court exclusively upon the allegations incorporated into the complaint, which must, for purposes of considering the motion to dismiss, be accepted as true. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989). "The question of whether qualified immunity attaches to an official's actions is a purely legal question for the trial judge to determine prior to trial." *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988); *see also Ramirez v. Webb*, 835 F.2d 1153, 1156 (6th Cir. 1987); *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987); *Donta v. Hooper*, 774 F.2d 716, 719 (6th Cir. 1985), *cert. denied*, 483 U.S. 635 (1987).

Thus, the question confronting this court, simply stated, is not whether Judge Feikens actually violated Guercio's first amendment right of free speech — an issue of fact reserved for the jury — but, rather, is whether plaintiff's rights were so clearly established when she was terminated that Judge Feikens should have understood that his conduct at the time he ordered her discharge violated her first amendment right to free speech — a question of law to be decided by the court. *Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987); *Garvie v. Jackson*, 845 F.2d at 649; *Ramirez v. Webb*, 835 F.2d at 1156.

In the case at bar, the district court was, without question, correct in concluding that the right that Guercio alleged Feikens to have infringed was, *in the abstract*, clearly established in 1981 under the Supreme Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1967). The teachings of *Pickering* charted the course for a determination of Judge Feikens's entitlement to the shield of qualified immunity. In that decision, the Supreme Court instructed that a public employee's interest in commenting on matters of public concern is protected by the first amendment only insofar as it is of greater weight than the employer's interest in "promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. Under this familiar rule of balance, the employee's rights to free speech are qualified by the countervailing interests of his employer. When a *Pickering* claim is adjudicated on its merits, it is for the fact-finder, be it jury or court, to determine the relative weight of these potentially antithetical interests. In the qualified immunity context, by contrast, it is the responsibility of the court to determine if the law was so clearly established at the time of the incident that a reasonably competent public official should have known that a course of action would be inconsistent with a public employee's rights as defined in *Pickering*.

Accordingly, having in the first instance properly defined the "clearly established by law" inquiry, this court must, in disposing of a qualified immunity motion, place the totality of the well-pleaded, non-conclusory allegations of the complaint on the *Pickering* scale to balance a public employee's interest in commenting on matters of public concern against the employer's interest in "promoting the efficiency of the public services it performs through its employees," *id.*, at 568. Without concluding where that balance ultimately comes to rest — a decision reserved for the trier of fact — this court must dispose of the motion to dismiss on the basis of qualified immunity pursuant to the dictates of *Harlow*, *Malley*,

Anderson, Garvie, etc., by determining whether *Guercio's* rights under *Pickering*, as opposed to whether the general teachings of *Pickering*, were so clear at the time in question that reasonable minds could not differ on the constitutionality of her discharge.

Writing upon a clean slate, then, the predicate issue to be decided by this appeal is whether Guercio's first amendment rights to free speech were so evident from pre-existing law (*viz.*, *Pickering*) when she was ordered discharged by Judge Feikens that, measured objectively, he was under an affirmative duty to refrain from such conduct. *Harlow v. Fitzgerald*, 457 U.S. at 818; *Anderson v. Creighton*, 107 S.Ct. at 3038; *Ohio Civil Service Employees' Ass'n v. Seiter*, 858 F.2d 1171, 1173 (6th Cir. 1988). This approach is distinct from that followed by the district court, which mischaracterized the qualified immunity inquiry as one requiring it "to determine whether the allegations in the Plaintiff's complaint clearly violated established law at the time that the incidents took place." Similarly reflective of the erroneous approach to the issue was the court's remark that "the . . . *Pickering* balancing test . . . [was] clearly established law at the time of Ms. Guercio's firing." As hereinafter discussed, the inquiry as framed by the district court was so abstract that its consideration of the motion to dismiss failed to apply the qualified immunity test *to the facts and circumstances of this case*. In sum, the district court's approach failed to apply the *Harlow* test, which in the first instance required a determination of whether a clearly established right was alleged to have been violated, and, secondly, a determination of whether a reasonable public official should have known that the conduct at issue was undertaken in violation of that right. As a consequence of its misdirection, the district court erroneously decided the defendant's qualified immunity motion to dismiss without applying the test that had been mandated by the Supreme Court and this circuit in *Harlow v. Fitzgerald, supra*; *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson*

v. Creighton, supra; *Dominque v. Telb, supra*; *Ramirez v. Webb, supra*; and *Garvie v. Jackson, supra.*

Garvie v. Jackson (a *Pickering* case of striking similarity) clearly counsels the application of a fact-specific, as opposed to abstract, approach to qualified immunity questions:

> We should focus on whether, at the time defendants acted, the rights asserted were clearly established by decisions of the Supreme Court or the courts of this federal circuit. Cf. *Davis v. Scherer*, 468 U.S. [183] at 192, 104 S.Ct. [3012] at 3018 [(1984)]; *Davis v. Holly*, 835 F.2d 1175, 1182 (6th Cir. 1987). "[Defendants] have qualified immunity unless plaintiffs' 'rights were so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.' " *Ramirez v. Webb*, 835 F.2d at 1156 (quoting *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987)). It is not determinative that the plaintiff has asserted the violation of a broadly stated general right:
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> > [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: *The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.* This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent.
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> *Anderson*, 107 S.Ct. at 3039 (citation omitted) [emphasis added]; *see also Malley*, 475 U.S. at 341, 106

> S.Ct. at 1096 (if officers of reasonable competence could disagree on an issue, immunity should be recognized).
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> * * * * * *
>
> In arguing against defendants' claim of qualified immunity, Garvie asserts that a reasonably competent public official would have known in 1986 that an alleged retaliatory termination of a department head based on the exercise of first amendment rights was unlawful. *We believe that under the reasoning of Anderson, however, Garvie's argument presents too general a question. Instead, we consider whether reasonably competent officials could have disagreed on whether and to what extent Garvie's speech was protected by the first amendment.*

Garvie v. Jackson, 845 F.2d at 649-50 (emphasis added). *See also Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.) (en banc), *cert. denied*, 109 S.Ct. 497 (1988) (" 'the test for immunity should be whether the law was clear in relation to the specific facts confronting the public official when he acted' ") (quoting *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987)); *Green v. Carlson*, 826 F.2d 647, 649 (7th Cir. 1987) (district court framed too general a question in examining abstract existence of clearly established constitutional right without considering "the specific facts of this case").

The standard to be applied in resolving the "clearly established law" predicate within the *Harlow* touchstone of "objective legal reasonableness" is defined in *Malley v. Briggs* with clarity: "*if officers of reasonable competence could disagree on this issue, immunity should be recognized.*" 475 U.S. at 341 (emphasis added). The qualified immunity test thus is not as stringent as the district court's disposition would imply, affording as it does "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.*

In light of *Pickering*, and mindful of the appropriate qualified immunity test as defined in *Harlow*, this court must decide from the continuous course of Guercio's conduct between December, 1979 and October, 1981, when she was discharged as recited in the complaint, if judges of reasonable competence in the position of Judge Feikens at the time here in issue could have disagreed upon whether her right to exercise her first amendment right to free speech without being terminated from her employment was outweighed by the public interest in restoring morale, cooperation, dignity, public respect, and confidence to the United States Bankruptcy Court for the Eastern District of Michigan, a court which had been corroded by corruption and favoritism.

In considering, pursuant to the mandate of *Pickering*, Guercio's asserted first amendment rights to speak on matters of public interest without jeopardy to her employment against any disruption that may have been caused by her disclosures of corruption in the bankruptcy court and in her circulation of the dated news accounts critical of Woods, this court should recollect the interdependent working relationship that existed between the bankruptcy and district courts and the judges thereof during 1981 when plaintiff's discharge occurred. Prior to the 1984 amendments to the Bankruptcy Code, bankruptcy judges were appointed by district court judges, and they served in a capacity "adjunct" to the district court. *See Northern Pipeline Construction v. Marathon Pipe Line Co.*, 458 U.S. 50, 76-87 (1982). The relationship was substantially changed in 1984 when the appointment of bankruptcy judges became the prerogative of the various circuit courts. *See* 28 U.S.C. § 152. The 1984 revisions to the Bankruptcy Code, although perpetuating the bankruptcy courts as functional adjuncts to the district courts, clarified and elevated jurisdictional distinctions between the courts, leaving the bankruptcy courts and judges in a more insular position than they had occupied previously. *See* 28 U.S.C. § 157.

Mindful of this historical condition, which was common to bankruptcy courts throughout the United States, and also mindful of the more particularized circumstances arising out of Judge Feikens's specially delegated responsibility pursuant to the mandate of the Sixth Circuit Judicial Council to restore morale, cooperation, public confidence, and efficient operation in the bankruptcy court, it is apparent that the potential for internecine conflict in the court was palpable and, moreover, that Judge Feikens's desire to prevent such conflict was both genuine and compelling.[3] Concerns for inter-chamber harmony, cooperation, and collegiality between judges and court personnel — judicially noticed by this court — were in all probability central and indispensable to the efforts of Chief Judge Feikens to implement the Sixth Circuit's mandate.

It is within this factual backdrop that the allegations of Guercio's second amended complaint that are material to the resolution of defendants' motion to dismiss invoking the defense of qualified immunity must be considered. These pertinent assertions appear in paragraphs 8 through 17 and paragraph 27 of the complaint, wherein Guercio relates her activities in disclosing corruption within the bankruptcy court, and paragraphs 18 through 26, wherein she recounts her activities in circulating the dated news accounts critical of bankruptcy judge designee Woods.

Accepting as true the nonconclusory allegations incorporated in these relevant sections of her complaint, it appears that Guercio's initiative — launched in 1979 — became, over a period of time, productive in notifying the District Court for the Eastern District of Michigan of improprieties that

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[3]At the time of Guercio's discharge, Chief Judge Feikens had been implementing the special delegation of responsibility to restore morale, cooperation, public confidence, and efficient operation in the bankruptcy court for approximately five months.

implicated both unethical and criminal conduct within the Detroit Bankruptcy Court. Although both Judge Feikens and the Administrative Office of the United States Courts (AO) initially withheld formal action on Guercio's original submissions, it appears from her pleadings that during the ensuing eleven months, plaintiff developed additional substantive factual proof to support her disclosures of irregularity in the Detroit Bankruptcy Court, which in turn prompted Judge Feikens to request the AO to investigate the situation. The investigation, which Judge Feikens requested and endorsed, and in which he actively participated along with the plaintiff and other authorities within the limits of his office, ultimately resulted in the resignations of Bankruptcy Judge Harry Hackett, Chief Clerk of the Bankruptcy Court William Harper, and Deputy Clerk Kathy Bagoff sometime around June 24, 1981.

As detailed above, a concerned Judicial Council of the Sixth Circuit intervened and placed the Bankruptcy Court into virtual receivership by an order dated May 6, 1981, the oversight of which mandate was delegated to Judge Feikens on May 18, 1981. The mandate was directed primarily at rehabilitating the court, and expressly conferred upon Judge Feikens (as sub-delegatee) responsibility for approving "*all personnel actions affecting employees of the Bankruptcy Court.*" *Guercio I*, 814 F.2d at 1116 (quoting Judicial Council mandate) (emphasis added).

For approximately twenty months, as the Bankruptcy Court investigation proceeded, plaintiff was neither admonished for nor discouraged from pursuing her activities, and she continued secure and free from threat to her employment. Under the circumstances, during this critical phase of the investigation and up to the point at which Guercio circulated the dated news articles critical of Woods, judges of reasonable competence could not but have believed that Guercio's job security was protected by the first amendment as interpreted in *Pickering*. However, in reaching a final disposition of the

defendant's motion to dismiss, Guercio's disclosure of irregularities in the bankruptcy court must be considered *along* with her circulation of the dated newspaper articles — that is, along the entire continuum of her conduct over an extended period of time, encompassing the totality of her activities as alleged in her complaint.[4]

The more pertinent allegations of the second amended complaint that bear upon the balance between Guercio's right to exercise her first amendment rights and the public interest in restoring morale, cooperation, public respect and confidence to the Bankruptcy Court for the Eastern District of Michigan — which effort was, at least until July or August of 1981, from the pleaded facts, progressing expeditiously and effectively — are pleaded in the following paragraphs of the second amended complaint:

> 17. Shortly after Hackett resigned, a committee of federal district court judges nominated attorney George E. Woods to replace Hacke as a Bankruptcy Judge. A three-attorney screening committee of Michigan attorneys approved the judges' nomination of Woods. Woods' nomination generated much public controversy, was widely criticized and defended, and was the subject of extensive media coverage.
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> 19. In the summer of 1981, plaintiff discovered old newspaper articles describing the controversy over Woods'

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[4]This case does not implicate the rule pronounced by the Supreme Court in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). Under *Mt. Healthy*, an employee may not successfully challenge her discharge if one of two asserted reasons for the termination — one constitutional and the other not — would, standing alone, have been sufficient to bring about the employer's decision. This case does not present a "dual motive" situation; according to Guercio's complaint, she was fired in response to a continuing course of conduct, and not *solely* as a result of her bankruptcy court disclosures or *solely* as a result of her distribution of the old newspaper articles critical of Woods.

1969 nomination for U.S. Attorney and its subsequent withdrawal. Plaintiff informed defendant Brody about the newspaper articles she had discovered regarding Woods and that she intended to distribute the articles to, among others, the committee considering Woods for the Bankruptcy Court judgeship. . . .

20. Plaintiff sent copies of the 1969 newspaper articles she had discovered concerning nominee Woods to the FBI, the AO, the judges' nominating committee, the United States Attorney's Office, and various newspaper reporters.

21. Woods informed defendant Brody that, because plaintiff had distributed the 1969 newspaper articles, Woods would, if appointed, refuse to work with defendant Brody unless plaintiff's employment were terminated. Defendant Brody thereupon discussed with defendant Feikens the demand by Woods that plaintiff be fired.

23. Upon information and belief, Judge Feikens demanded that Judge Brody terminate plaintiff's employment in light of the above disclosures concerning Woods. On October 16, 1981, Judge Brody did terminate plaintiff's employment.

24. Defendants Feikens and Brody were motivated to effect and did effect plaintiff's termination solely because of her participation in exposing corruption in the Bankruptcy Court and her distribution of the 1969 newspaper articles critical of the nominee who was being considered to replace the judge whose corruption had been exposed by plaintiff. . . .

27. The disruption in the Bankruptcy Court workplace, if any, that may have resulted from plaintiff's disclosures regarding the manipulation of the random

> assignment system and other disclosures of illegal activity, was minor, and such disruption, if any, was in fact caused only by those associated with or sympathetic to the persons whose illegal activities plaintiff had participated in exposing.

The nonconclusory allegations of paragraphs 17 through 27 of the second amended complaint recite that the dated news accounts critical of Woods were circulated after a committee of federal district judges of the Eastern District of Michigan had nominated him to replace Hackett as a bankruptcy judge, after his background and qualifications had been investigated, and after his nomination had been endorsed by a screening committee of three Michigan attorneys. In sum, the nominative and appointive procedures, including the required investigations, had been exhausted to completion when Guercio released the dated news accounts, which had been of public record for approximately eleven years. The circulation was not accompanied by any newly discovered disclosures of concealed past or current misdeeds or wrongdoing relative to the substance of the circulated news accounts critical of Woods. Guercio did not attest to the truthfulness or accuracy of the circulated news accounts nor did she directly express an opinion as to the integrity, honesty, ability, or other qualifications of Woods to serve as a bankruptcy judge.

Mindful of the disruptive implications of the turmoil within the Detroit Division of the Bankruptcy Court together with the Sixth Circuit Judicial Council's delegated mandate to restore the public confidence and efficient operation of the court by, among other actions, expeditiously appointing a judge to the vacancy created by the resignation of Judge Hackett; of the disharmony precipitated by Guercio's distribution of dated news articles, which disharmony Guercio has conceded affected to some degree the operation of the Bankruptcy Court, at least among personnel sympathetic to those individuals whose activities she had exposed; and of the

incipient confrontation manifested by the bitter resentment Woods displayed when he advised Judge Brody that he would, if appointed, refuse to work with Brody unless Guercio's employment were terminated, a competent judge in the position of Judge Feikens could have reasonably:

1. questioned if the circulation of the dated news accounts constituted an expression of speech protected by the first amendment;

2. concluded that plaintiff's expressions and activities concerning Woods served to frustrate the implementation of the Sixth Circuit Judicial Council's delegated mandate to restore the public confidence in the Detroit Bankruptcy court because they discredited and embarrassed the appointive procedure and raised the genuine spectre of conflict between judges of the court;

3. concluded that Guercio's expression and activities had become a force counterproductive and disruptive to the ongoing effort to rehabilitate and revitalize the operation of the Detroit Bankruptcy Court;[5] and

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[5]Conclusions (2) and (3) were especially reasonable in light of Justice Powell's admonition that

> the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (quoted with approval in *Connick v. Myers*, 461 U.S. 138, 151 (1983)). As noted in *Connick*, it is a "common-sense realization that government offices could not function if every employment decision became a constitutional matter." 461 U.S. at 143.

4. concluded that Guercio was no longer speaking out on matters of public interest, but rather had begun to speak as an employee on matters primarily of personal concern.

In considering Guercio's recitation of her continuous course of conduct as incorporated into her complaint, but before proceeding to a final resolution of the qualified immunity motion to dismiss within the confines of her pleadings, this court emphasizes that its disposition is not anchored in any single doctrinal point heretofore discussed, which, standing alone, would enable the appellants to prevail. Rather, the decision is rooted in the cumulative effects of the points discussed, together with an informed assessment of the general state of the law, all in the context of an inquiry that necessarily focuses on the objective reasonableness of an official's act when viewed in light of all properly pleaded facts.

Accordingly, accepting as true the totality of Guercio's allegations reciting a course of continuous conduct and events for the period from December, 1979, through the summer of 1981, this court must balance on the *Pickering* scale — without deciding where the balance will ultimately come to rest (a question of fact reserved for the jury) — Guercio's right to freely express herself as a citizen upon matters of public interest against the Bankruptcy Court's interest, as effectuated through Judge Feikens, in promoting the efficiency of the public services it performs through its employees. *See Pickering*, 391 U.S. at 568.

Malley and its progeny, including *Garvie*, *Dominque*, and *Ramirez* in this circuit, mandate that if judges of reasonable competence in the position of Judge Feikens at the time of Guercio's termination, measured objectively, could have disagreed as to where the *Pickering* balance would ultimately come to rest, the protection of qualified immunity should be granted. In this court's considered opinion, accepting the totality of plaintiff's well-pleaded allegations as true, judges

of reasonable competence in the position of Judge Feikens at the time here in controversy, measured objectively, could have disagreed as to:

1. whether and to what extent Guercio's speech was on a matter of public concern, entitling her to claim the protection of the first amendment; and

2. where the *Pickering* scale, with all of the parties' competing interests in the balance, would ultimately come to rest.

Consequently, for the reasons herein, it is the court's judgment that Guercio's right to protection under the first amendment was not so clearly established at the time that Feikens ordered her termination that any judge of reasonable competence in the position of Judge Feikens, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.

For these reasons, both Judge Feikins and Judge Brody[6] are entitled to the protection of qualified immunity. The district court's dispositions are therefore reversed and the cases are remanded with instructions to vacate the judgments below and dismiss the plaintiff's causes of action insofar as they seek the recovery of monetary damages from Brody and Feikens in their individual capacities.[7] Existing precedent

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[6]The qualified immunity question must be approached from the perspective of Judge Feikens, only, because it is clearly alleged that Brody terminated Guercio only upon direction from Feikens, and not for independent reasons or on his own initiative. Having concluded that Feikens is entitled to immunity, then Brody, too, benefits from that determination.

[7]A court may properly dispose of a case for reasons of qualified immunity on a motion to dismiss on the pleadings, without discovery or the filing of a motion for summary judgment. "[A] defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). A

within this circuit, however, dictates that the defense of qualified immunity protects officials only from suit for *monetary damages*. *Hensley v. Wilson*, 850 F.2d 269, 273 (6th Cir. 1988); *Littlejohn v. Rose*, 768 F.2d 765, 772 (6th Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986). "An official is not entitled to immunity from actions seeking only injunctive or declaratory relief." *Spruytte v. Walters*, 753 F.2d 498, 510 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

In light of the policy underlying the doctrine of qualified immunity, it is worth noting that the rule excepting equitable claims from a defense of a qualified immunity assumes dubious validity if applied without particularized concern for individual cases. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Supreme Court noted that "the 'consequences' with which [it was] concerned in *Harlow are not limited to liability for money damages* . . . ." *Id.* at 526 (emphasis added). Rather, in formulating the qualified immunity doctrine, the Court was primarily concerned with preventing the distraction of public officials from the performance of their discretionary governmental duties by shielding them " 'from the risks of *trial* . . . .' " *Id.* (quoting *Harlow*, 457 U.S. at 816) (emphasis added). The Sixth Circuit's rule excepting equitable claims from the defense of qualified immunity is predicated on the notion that "actions against parties in their official capacities are, essentially, actions against the entities for which the officers are agents." *Littlejohn v. Rose*, 768 F.2d at 772. Insofar

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"defendant could properly challenge the sufficiency of the complaint under F.R.C.P. 12(b)(6) on the basis that he was entitled to qualified immunity *because the facts pleaded* would not show that his conduct violated clearly established law of which a reasonable person would have known at the time." *Dominque v. Telb*, 831 F.2d at 677 (emphasis added). *See Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986) (failure to plead violation of a clearly established right of which a reasonable official would have known "precludes plaintiff from proceeding further, even from engaging in discovery . . . .").

as this approach to equitable claims does not place public officials at the peril of defending actions for which they have been held immune from personal liability, there is no genuine conflict with the quoted language from *Mitchell v. Forsyth.*

It is difficult, however, to discern precisely which governmental "entity" will assume the burden of defending against Guercio's equitable claims on remand.[8] Thus, in this case it is by no means clear that dismissal of all but the equitable claims will fully serve the purpose for which qualified immunity is granted under *Harlow.* The cited Sixth Circuit cases reflect no limiting principle with respect to when it is (or is not) appropriate to exclude equitable claims from the coverage of an otherwise valid defense of qualified immunity, and this panel must accept and apply the dictates of this circuit's enunciated precedents. For this reason, Guercio's remaining equitable claims asserted against the appropriate governmental entity — the request for a declaratory judgment, for a mandatory injunction ordering Guercio's reinstatement to the same or a similar position to which she held at the time of her discharge, and for backpay and benefits up to $9,999.00[9] — must be remanded to the district court for additional consideration, notwithstanding appellants' entitlement to qualified immunity from the claim for money dam-

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[8]As noted by the Federal Circuit in its disposition of the Little Tucker Act jurisdictional question, *see supra* note 1, Guercio was "an employee of the court to which she was appointed" and not of any discernible governmental agency. *Guercio v. Brody,* 884 F.2d at 1374.

[9]As explained *supra* at note 1, Guercio limited her claim for backpay and benefits to $9,999.00 so as to preserve the jurisdiction of the district court over what she presumed to be a claim brought under the Little Tucker Act. In concluding that Guercio had *not* stated a claim under the Little Tucker Act, the Federal Circuit was unable to discover any "statutory or regulatory authority that it might entitle a person in Guercio's position to an award of back pay . . . ." *Guercio v. Brody,* 884 F.2d at 1374. Therefore, among Guercio's burdens on remand will be to prove the existence of a valid cause of action for backpay.

ages. This court further notes, however, that it appears unlikely that Guercio may recover all of the equitable relief that she requests in her complaint. Specifically, the authority of the district court to order Guercio reinstated to "her former position or an equivalent position" is subject to question. First, this court takes notice of the fact that Bankruptcy Judge Brody has retired from the court, and consequently Guercio's secretarial position no longer exists. Second, the availability of "equivalent positions" is debatable and this court doubts that a judge of the bankruptcy court may be ordered to employ a confidential secretary not of his or her personal selection.

Accordingly, the judgment of the district court denying appellants' motion to dismiss is **REVERSED** and the case is **REMANDED** to the district court for adjudication of Guercio's remaining equitable claims for relief.

WELLFORD, Circuit Judge, concurring in part and dissenting in part:

I am most reluctant to dissent from the thoughtful opinion in this very difficult case. Had a motion for summary judgment been filed in this case by defendants rather than a motion to dismiss, I am persuaded that application of the balancing test under *Pickering v. Board of Education*, 391 U.S. 563 (1967), would have presented a less complex problem to solve.

Persons standing in the position of defendants, asserting qualified or good faith immunity, could reasonably view plaintiff's actions as bringing about disharmony, recrimination, and continued turmoil in that court, which was in virtual receivership, with Judge Feikens named as an effectual receiver. 28 U.S.C. § 332(d)(2), dealing with the formation and operation of circuit judicial councils, directs that "[a]ll judicial officers and employees of the circuit shall promptly carry into effect all orders of the circuit council." Judge Feikens was placed with ultimate "supervisory responsibility and oversight" and directed to restore that court's harmonious, efficient and effective operations. *See Guercio I.*

Pickering stands for the essential proposition that a public employee (in that case a public school teacher) could not be compelled by threat of discharge to relinquish first amendment rights of public criticism of the public employer (the school board). At the same time, the Supreme Court recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568. The Court proceeded to state the problem in such a case: "to arrive at a balance between the interests of the teacher . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs . . . ." *Id.* at 568. Because Pickering's general public criticism of policies was "*in no way*

directed towards any person with whom appellant [Pickering] would *normally be in contact* in the course of his daily work as a teacher," there was therefore "no question of maintaining either discipline by immediate superiors or *harmony among coworkers*. . . ." *Id.* at 569-70 (emphasis added). While *Pickering* would cause defendants to be aware that plaintiff retained her first amendment right to criticize publicly the general policies of her employer, they were obviously aware that the conduct in question was directed toward Woods, who was to be a vital cog in the bankruptcy court operation, and her conduct in circulating old newspaper articles critical of Woods threatened the harmonious and effective relations necessary to bring about the expeditious administration of business and justice in the bankruptcy court.

The problem here which I cannot escape, and the reason for my dissent in part, is that the motion to dismiss requires us to take as true conclusory allegations in the amended complaint that may be inconsistent with other factual predicates in the complaint and with the historical record of what actually happened in the bankruptcy court based on Guercio's whistleblowing and responses of others who brought about the resignations of a bankruptcy judge, the clerk, and a deputy clerk. Guercio says in her complaint that she instituted charges about corruption over a twenty-month period, and no action whatever was taken to threaten her position as confidential secretary during all this time. It would seem that only after her later distribution of old newspaper accounts about Woods and the latter's reaction was there any motivation or purpose to bring about her termination. She concedes that Judge Feikens gave approval for a thorough investigation a year before her discharge, knowing of her role as a whistleblower. Yet plaintiff asserts (paragraph 24) that "*solely* because of her participation in exposing corruption in the Bankruptcy Court *and* her distribution of the 1969 articles," she was discharged (emphasis added).

If we were considering the issue based on a motion for summary judgment, a balancing of the important public interests of preserving harmony and avoiding discord in a shattered court against an employee's first amendment right to distribute stale information directed towards an important figure on that court might well result in a finding for defendants based on qualified immunity and on the *Pickering* balancing test. We cannot, however, properly take that step, despite my colleague's persuasive analysis in the majority opinion, because we are dealing with a Rule 12(b)(6) motion. I recognize, of course, that a summary judgment motion would engender proof beyond the complaint and I make no prejudgment with respect to the ultimate ruling on a summary judgment motion based on qualified immunity.

Regretfully, I cannot agree with two propositions in the majority's analysis:

> (1) "a competent judge in the position of Judge Feikens could have reasonably questioned if the circulation of the dated news accounts constituted an expression of speech protected by the first amendment," and
>
> (2) defendants could reasonably have concluded that "Guercio was no longer speaking out on matters of public interest, but rather . . . on matters primarily of personal concern."

Connick v. Myers, 461 U.S. 138 (1982), gives us guidance in this latter regard, but the content and nature of Guercio's expressions differ materially from those of Myers, who was found to be looking out to preserve her own personal interests rather than to engage in discussion of matters of public interest. *Connick* puts the matter in proper perspective:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental.

> This language, reiterated in all of *Pickering*'s progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government officers could not function if every employment decision became a constitutional matter.

Connick v. Myers, 461 U.S. at 143 (footnotes omitted).

I am in agreement with the majority analysis concerning the procedural posture and background of this controversy. I also concur in the conclusion concerning the remand to the district court with respect to the equitable claims made by Guercio.

I dissent on the reversal of the district court order on the damages aspect of plaintiff's complaint.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HELEN GUERCIO,

Plaintiff

v. Civil Action No. 84-CV-74736-DT

GEORGE BRODY, et al, HON. JULIAN ABELE COOK, JR.

Defendants

_____/

ORDER

On September 1, 1988, the Defendant, John Feikens,1 filed a motion, contending that he is entitled to an order of dismissal on the basis of an absolute judicial immunity defense or, in the alternative, the protections of qualified immunity.2 For reasons that have been set forth below, this Court must deny his motion.

I

In July 1985, this Court granted Judge Feikens' original motion to dismiss, after concluding that he was entitled to an absolute immunity defense as a judicial officer. On April 1, 1987, the Sixth Circuit Court of Appeals reversed.3 Nearly three months later (July 17, 1987), an en banc rehearing on the absolute immunity issued was ordered by that Court.4 However, on March 2, 1988, the appellate court vacated the July 17th directive, reinstated its April 1st order, and remanded the case to this Court for further proceedings.5

II

In Forrester v. White, 56 U.S.L.W. 4067 (U.S. Jan. 12, 1988) (No. 86-761), the Supreme Court was asked to determine whether a state court judge had absolute immunity from a 42 U.S.C. S 1983 claim for damages which arose from his decisions to demote and subsequently dismiss a probation officer. The plaintiff, who alleged that she had been demoted and terminated because of her sex, was awarded $81,818.80 in compensatory damages by a jury. However, the federal district court judge, before whom the trial was conducted, set aside the verdict and granted a summary judgment in favor of the defendant on the basis of his absolute judicial immunity defense. A divided panel of the Seventh Circuit Court of Appeals affirmed.6

The Supreme Court reversed, reaffirmed the "functional approach" to immunity questions,7 and concluded that the state judge had acted in an administrative capacity - not as a judicial officer - when he discharged Cynthia Forrester.

Justice O'Connor, writing on behalf of her colleagues,8 opined that the difficulty in resolving judicial immunity issues was "draw[ing] the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges."9 Thereafter, she concluded that "immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches."10

The Forrester Court also found that while personnel decisions "may have been quite important in providing the necessary conditions of a sound adjudicative system[,] [t]he decisions . . . were not themselves judicial or adjudicative,"11 reasoning that "a judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or . . . from any other executive branch official who is responsible for making

such employment decisions."12 Judge White had argued that he was the only person in his court with authority to hire or fire probation officers under Illinois law. However, the Supreme Court found this position to be unpersuasive, stating "that because a judge acts within the scope of his authority, [and, thereby, conclude that] such employment decisions are converted into 'judicial acts,' would lift form above substance."13

III

In the instant motion, Judge Feikens contends that he had acted pursuant to a directive from the Judicial Council.14 It is his belief that the authority, which had been conferred upon him by the Judicial Council, could only have been performed by a judge. On the basis of the Forrester rationale, this argument would appear to lift, or attempt to lift, form above substance.

The "function" involved in this case was a personnel decision. Like the judge in Forrester who was the only person authorized by statute to make personnel decisions, Judge Feikens had specific authority from the Judicial Council to undertake those measures that would be necessary in order to rid the Bankruptcy Court of its scandal. However, this directive did not modify or alter the nature of the decision to terminate the employment of the Plaintiff, Helen Guercio, from an administrative determination to a judicial act. To hold otherwise would run directly counter to the "functional approach" to judicial immunity under the Forrester standard.

Therefore, this Court concludes that the teaching of Forrester v. White requires a finding that Judge Feikens is not entitled to the protection of an absolute judicial immunity defense with regard to his role in the termination of Ms. Guercio's employment with the Bankruptcy Court.15

IV

This Court now turns to Judge Feikens' contention that his approval of Judge Brody's decision to discharge Ms. Guercio is protected by the doctrine of qualified immunity.16 The doctrine of qualified immunity was articulated in Harlow v. Fizgerald, in which the Supreme Court stated that:

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.17

The purpose of providing qualified immunity protection to public servants is to insulate them from meritless lawsuits, which, in turn, would prevent the expenditure of unnecessary social costs by the Government, including:

> the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.18

In order to achieve this stated purpose, the Supreme Court made it clear that the protection of qualified immunity is not merely an affirmative defense to liability on the merits. Rather, it is "an entitlement not to stand trial or face the other burdens of litigation, . . . [which is] . . . conditioned on the resolution of the essentially legal question whether the conduct of which the Plaintiff complains violated clearly established law."19 Thus, the application of the Harlow standard during the litigation stage of a proceeding has been viewed by one court as being extremely important in those situations in which:

> plaintiffs might allege facts demonstrating that defendants had acted lawfully, append a claim that they did so with an unconstitutional motive, [i.e., creating a question of fact] . . . and as a

> consequence usher defendants into discovery, and perhaps trial . . . [which is] ... precisely the burden Harlow sought to prevent.20

A discussion of how Harlow should be applied, especially in the context of a dispositive motion, is contained in Kennedy v. City of Cleveland, in which the Court stated:

> A defendant may initially raise immunity as a bar to litigation in a motion to dismiss. Where a defendant official is entitled to qualified immunity the plaintiff must plead facts which, if true, describe a violation of a clearly established statutory or constitutional right of which a reasonable public official, under an objective standard, would have known. The failure to so plead precludes a plaintiff from proceeding further, even from engaging in discovery, since the plaintiff has failed to allege acts that are outside the scope of the defendant's immunity.21

In Dominque v. Telb, the Court of Appeals for the Sixth Circuit vacated the denial of a motion by the defendant, who had sought dismissal on the basis of a qualified immunity defense, because the trial court erroneously "placed upon the defendant the entire burden to justify his entitlement to qualified immunity."22 The Court explained that the plaintiff:

> should normally include in the original complaint all of the factual allegations necessary to sustain a conclusion that defendant violated clearly established law.23

In determining that it was not the burden of the defendant to prove that its conduct did not violate clearly established law, the Dominque Court opined:

> Even though qualified immunity is an affirmative defense, the district court should not require the defendant to prove, upon penalty of denial of his motion, that the conduct plaintiff alleged did not violate clearly established law . . . .

Rather, . . . the district court must decide the purely legal question of whether the law at the time of the alleged action was clearly established in favor of the plaintiff.24

We now turn to the question of whether the firing of Ms. Guercio by Judge Feikens violated "clearly established law" as it existed in October 1981.25 This Court must determine whether "the contours of the right that the government official allegedly violated was [sic] sufficiently clear that a reasonable official would have understood that what he was doing violates that right."26 In 1987, the Supreme Court offered some guidance for these determinations by stating:

> this is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of preexisting law the unlawfulness must be apparent.27

The seminal case concerning public employment and an employee's right to speak on matters of public concern is Pickering v. Board of Education.28 In Pickering, the Supreme Court held the dismissal of a high school teacher for openly criticizing the Board of Education about its allocation of school funds was impermissible under the First Amendment. The Court explained:

The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public service it performs through its employees.29

This constitutional right, like many others, involves a balancing test which contains factors that were subsequently analyzed and summarized by the Sixth Circuit Court of Appeals:

Relevant factors justifying a state's regulation of

> its employees' speech include the content of the speech, coworker harmony, maintaining discipline by immediate supervisors, need for personal loyalty and confidence between workers and supervisors . . . and the time, place and manner in which the speech is delivered.30

All of these factors, as well as the underlying Pickering balancing test, were clearly established law at the time of Ms. Guercio's firing. Ms. Guercio asserts that she was terminated as Judge Brody's legal secretary because of her (l) contribution to the investigation of the corruption within the Bankruptcy Court which resulted in the resignation of another Bankruptcy Judge and the convictions of the Bankruptcy Clerk and a highly successful bankruptcy attorney, and (2) disclosures concerning then nominee George Woods.3l Prior to her involuntary departure from the Bankruptcy Court, Ms. Guercio transmitted newspaper articles about the the nominee's alleged "contacts with organized crime" to the Federal Bureau of Investigation, the nominating committee, the United States Attorney's Office, among others.32 She also asserts that nominee George Woods, reacting to these communications, informed Judge Brody that he, if appointed, would not work with him unless Ms. Guercio's employment with the Bankruptcy Court was terminated.33 Ms. Guercio believes that Judge Feikens learned of the demand and, thereafter, ordered her to be fired.34

Judge Feikens contends that, on the basis of his responsibility to restore integrity to the scandal-ridden Bankruptcy court, it was reasonable for him to conclude that his involvement with regard to Ms. Guercio's termination of employment from the Bankruptcy Court was lawful.

Judge Feikens also submits that he is entitled to the protections of qualified immunity because all of his activities involving Ms. Guercio were conducted pursuant to a directive from the Judicial Council of the Sixth Circuit which required him to supervise the Bankruptcy Court. He asserts that this directive "conveyed an authority to him comparable to the

authority inherent in his more accustomed judicial acts" with respect to personnel decisions in the Bankruptcy Court.35 Judge Feikens maintains that a chief district court judge, who acts "pursuant to a judicial council order under Sec. 332(d)(1), still has every reason to believe that the authority delegated thereby is judicial in nature."36

The content of Ms. Guercio's oral and written expressions are undeniably protected speech concerning a public issue. The Court of Appeals for the Sixth Circuit has determined that "[p]ublic interest is near its zenith when ensuring that public organizations are being operated in accordance with the law."37 Ms. Guercio's criticism in this case were directed to the illegal and unethical practices within the Bankruptcy Court - not to the conduct of her immediate supervisor. Therefore, it cannot be said that Ms. Guercio imperiled or threatened the loyalty and/or responsibility to her immediate supervisor, Judge Brody.

In Pickering v. Board of Education, supra, the Court noted:

> The [critical] statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. . . Appellant's employment relationships with the Board . . . are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.38

In this case, Ms. Guercio worked for Judge Brody on a daily basis - not the whole Bankruptcy Court or Judge Woods - about whom she was arguably critical. Judge Feikens was under a duty to consider all of the relevant factors when he authorized the employment termination of Ms. Guercio. The speech in question in this case was ostensibly made in the context of some very troubling allegations concerning corruption in the Bankruptcy Court many of which were sadly proven to be true.

Public policy strongly supports and encourages such speech.39

This Court concludes that the movant in this instance should have known that the termination of an employee for conducting those activities which have been outlined on this record would strike at the core of Ms. Guercio's First Amendment protections and violate clearly established law, as articulated in Pickering thirteen years earlier.

Finally, it has been alleged that Ms. Guercio cannot defeat Judge Feikens' qualified immunity claim because her Complaint pleads "retaliatory" intent in a conclusory manner. In the context of qualified immunity, whenever a complaint involves a "claim that defendants acted with an unconstitutional motive, [this court] will require that nonconclusory allegations of evidence of such intent must be present in a complaint."40 Contrary to the movant's assertion, this Court does not find the Complaint to contain merely conclusory allegations. Ms. Guercio has clearly alleged the events and circumstances, as she perceived them, with sufficient particularity to satisfy the pleading requirements of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

/s/ Julian Abele Cook, Jr.
JULIAN ABELE COOKE, JR.
United States District Judge

Dated: Jan 5 1989
Detroit, Michigan

FOOTNOTES

1/ Defendant, John Feikens, served as the Chief Judge of the United States District Court for the Eastern District of Michigan from October 4, 1979 until March 1, 1986. He assumed senior status on March 1, 1986.

2/ An oral hearing was conducted on October 14, 1988.

3/ Guercio v. Brody, 814 F.2d 1115 (6th Cir. 1987).

4/ Id., 823 F.2d 166 (6th Cir. 1987).

5/ Id., 840 F.2d 358 (6th Cir. 1988); 859 F.2d 1232 (6th Cir. 1988).

6/ Forrester v. White, 792 F.2d 647 (7th Cir. 1986).

7/ Forrester v. White, 56 U.S.L.W. at 4068.

8/ Justice O'Connor delivered the opinion of the Court in which the remaining members joined in all of the opinion except Part II of which Justice Blackmun joined.

9/ Forrester v. White, 56 U.S.L.W. at 4069.

10/ Id. [emphasis in original].

11/ Id., at 4070.

12/ Id.

13/ Id.

14/ The Judicial Council stated in an order dated May 6, 1981:

> The Council concludes that the effective

and expeditious administration of the business of the courts within this circuit requires that the administration of the Bankruptcy Court for the Eastern District of Michigan be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision should include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court.

By an order of May 18, 1981, the judges of the U.S. District Court for the Eastern District of Michigan directed Chief Judge Feikens to assume supervisory responsibility for the Bankruptcy Court pursuant to the earlier order of the Judicial Council of the Sixth Circuit.

Guercio v. Brody, 814 F.2d 1115, 1116 (6th Cir. 1987).

15/ Arguably, the issue of Judge Feikens' claim to absolute judicial immunity has been resolved without the necessity of a Forrester evaluation, as outlined above. The recently reinstated April 1, 1987 order held that the firing of Ms. Guercio was not protected by the doctrine of absolute immunity. Thus, on the basis of the current record, this Court accepts the April 1st decision as the law of the case.

16/ Defendant, George Brody, sat as a Bankruptcy Judge from 1960 to 1988. He submitted the same legal argument to this Court as in the instant motion. He has appealed the rejection of his motion to the Sixth Circuit Court of Appeals. Although this Court had considered the

imposition of a stay of Judge Feikens' current motion until the appeal of Judge Brody had been finally resolved, the interest of justice and administrative efficiency mandates a more immediate decision.

17/ Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

18/ Id., at 814.

19/ Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

20/ Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984).

21/ Kennedy v. City of Cleveland, 797 F.2d 297, 299 (6th Cir. 1986).

22/ Dominque v. Telb, 831 F.2d 673, 676 (6th Cir. 1987).

23/ Id.

24/ Id.

25/ The general principle that "the district court must consider all the undisputed evidence. . . read in the light most favorable to the nonmoving party" is not affected by the examination of the qualified immunity issue by this Court. Poe v. Haydon, No. 87-5377, Slip op. at 12 (6th Cir. July 28, 1988).

26/ Poe v. Haydon, No. 87-5377, Slip Op. at 12 (6th Cir. July 28, 1988), citing Anderson v. Creighton, ___ U.S. ___ , 107 S. Ct. 3034, 3039 (1988).

27/ Anderson v. Creighton, 55 U.S.L.W. 5092, 5093 (U.S. June 25, 1987).

28/ 391 U.S. 563 (1968).

29/ Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

30/ Columbus Education Association v. Columbus City School District, 623 F.2d 1155, 1160 (6th Cir. 1980) [citations omitted].

31/ Judge George Woods served as a Bankruptcy Judge in the Eastern District of Michigan from 1981 until 1983 when he was elevated to the United States District Court for the Eastern District of Michigan. He currently sits as a member of that bench.

32/ Second Amended Complaint, paras. 18, 19, 20.

33/ Id., para. 21.

34/ Id., paras. 23-24.

35/ See Defendant's Brief at 12.

36/ Id.

37/ Marhonic v. Walker, 800 F.2d 613, 616 (6th Cir. 1987).

38/ Pickering v. Board of Education, 391 U.S. 563, 570 (1968).

39/ Marhonic v. Walker, 800 F.2d 613, 616 (6th Cir. 1987).

40/ Hobson v Wilson, 737 F.2d 1, 29-30 (D.C. Cir. 1984); see also, Guiterrez v. Municipal Court of the Southeast Judicial District, 838 F.2d 1031, 1051 (9th Cir. 1988); Poe v. Haydon, supra, at 25.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 84-CV-4736 DT

HELEN GUERCIO, PLAINTIFF

v.

GEORGE BRODY AND JOHN FEIKENS, DEFENDANTS

[FILED Aug. 28, 1985]

JUDGE'S DECISION ON MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Proceedings held in the above-entitled matter, before the HONORABLE JULIAN ABELE COOK, JR., U.S. District Judge, at 237 U.S. Courthouse and Federal Building, Detroit, Michigan, on Wednesday, July 10, 1985.

APPEARANCES:

CONSTATINE NICHOLAS REVELOS, ESQ.
MARYA C. YOUNG, ESQ.

Appearing on behalf of Plaintiff.

KEITH FISCHLER, ESQ.
Assistant United States Attorney

Appearing on behalf of Defendants.

* * *

DENISE A. MOSBY, CSR-RPR
Federal Official Court Reporter

Detroit, Michigan
Wednesday, July 10, 1985
Afternoon session

— — —

THE COURT: Thank you.

On October 15, 1984, the Plaintiff Helen Jean Guercio filed a complaint for damages and injunctive and declaratory relief with this Court against Defendants George Brody and John Feikens.

On January 2, 1985 this Court, having reviewed the Plaintiff's complaint, sua sponte dismissed the complaint to the extent, quote, that it makes allegations against Brody's and Feiken's judicial acts, end of quote.

Pursuant to a directive from the Court, the Plaintiff filed an Amended Complaint against the Defendants, in which she set forth a claim against the Defendants in their official and personal capacities.

The Plaintiff Helen Jean Guercio was, prior to the commencement of the original Complaint, a secretary to the Defendant George Brody, who was and is a Judge of the Bankruptcy Court within this district. At some point in time her responsibilities as the secretary to Judge Brody were terminated because, she alleges, Judge Brody had cited her conduct in criticizing a then prospective member of the Bankruptcy Court. The Plaintiff contends that she was fired from her job in contravention of her 5th Amendment right not to be deprived of any property interests which she acquired by virtue of her employment. She also claims that the termination of her responsibilities as Judge Brody's secretary constituted a deprivation of her 1st Amendment rights.

The plaintiff has also made a claim against the Defendant John Feikens, who, at all times that are relevant to these proceedings, was the Chief Judge of the United States District Court for the Eastern District of Michigan and served at times that preceded the commencement of this litigation as the receiver of the Bankruptcy Court.

Subsequent to the filing of the Amended Complaint, the Defendants filed a Motion to Dismiss Complaint or, in the Alternative, for Summary Judgment, citing Federal Rules of Civil Procedure 12(b)(6) and 56, respectively.

The Defendants claim that, one, they are entitled to absolute judicial immunity; two, that if absolute immunity is not appropriate, then they are entitled to be protected by a qualified immunity; and, third, that the Plaintiff has failed to state a cause of action. In so doing, the Defendants argue, one, that her 5th Amendment claim is without merit because she has no property right in her employment. The Defendants also argue that the Plaintiff has failed to establish or to allege that she has sustained any actual injury to her reputation, contending that nothing that was allegedly made public has demonstrated that she was damaged in any way.

The Defendants also argue that when applying the so-called PICKERING test, which originates from the case of PICKERING V. BOARD OF EDUCATION, 391 U.S. 563, that the balancing test limits the 1st Amendment rights of public employees. The Defendants assert that under the PICKERING test, that the balancing test would flow toward them; and, thus, there is no basis for her claim under PICKERING.

The Plaintiff, in response, takes issue with each of the positions which have been advanced by the Defendants and contends that none of the arguments which have been presented to the Court by the Defendants have merit. More specifically, the Plaintiff argues that neither Judge Brody nor Judge Feikens is entitled to an absolute judicial

immunity. The Plaintiff argues that the absolute judicial immunity doctrine is limited only to those acts which are of a judicial nature. The Plaintiff contends that this immunity applies only to legal decisions, since those decisions, if erroneous, can be corrected on appeal.

The Plaintiff also contends that the Defendants are in error when they contend that they are entitled to qualified immunity. The Plaintiff contends that there remain many genuine issues of material fact which, under the standards of summary judgment, should defeat their motion for dismissal and/or for summary judgment.

The Plaintiff has also attacked the PICKERING test and indicates that to adopt the standard which the Government has advanced to this Court would give to any judicial officer the right to summarily dismiss an employee.

And, finally, the Plaintiff argues that there are, as noted earlier, that there are many genuine issues which should be presented to a trier of fact for resolution.

The Court has examined the briefs which have been filed by the parties in this case. The Court has examined all of the positions which have been advanced by the parties in support of and in opposition to the positions which have been presented.

For the reasons which will be noted by the Court, the Court believes that the Government's motion for dismissal on the basis of absolute immunity should be granted. The Court believes that the remaining issues—namely, qualified immunity and failure to set forth a claim—need not be addressed in view of the ruling of the Court.

The Court believes that the case of STUMP v. SPARKMAN, 435 U.S. 349, a 1978 case which holds that absolute immunity for judges is applicable to all actions in which the Judge—that the Judge assumes. We believe that an examination of the applicable case law—and, parenthetically, there are no cases which have been pre-

sented to the Court which are truly applicable here, because the factual situation in the instant cause is different from any of the cases which have been cited—this Court believes that the interpretation of the judicial responsibilities which has been presented to the Court by the Plaintiff is far too narrow.

In the case of Judge Feikens, who had the responsibility of serving as the Chief Judge of the United States District Court, as well as the receiver for the Bankruptcy Court, there were responsibilities that he was required to and empowered to undertake in those capacities. To place a judicial officer in the position which has been advanced by the Plaintiff would, in the judgment of this Court, run contra to the spirit as well as the language of the cases which touch upon the issue of absolute judicial immunity.

While the Court recognizes that the actions of Judge Feikens and Judge Brody were not actions that were taken in the courtroom under the normal advocacy proceedings, that we believe that the actions of the Judges, whether correct or not, were done within their capacity as Judge of the United States District Court and Judge of the United States Bankruptcy Court for this district. We believe that the doctrine of absolue immunity is applicable here; and, thus, the Court will grant, as noted earlier, the request for dismissal by the Government.

As noted earlier, the issues which have been addressed by the parties on the other issues need not be advanced. The Court believes that, notwithstanding the argument of the Plaintiff that an adoption of the absolute immunity doctrine would not eliminate the case, this Court differs and believes that under the ruling of this Court, it represents a final order that the Motion to Dismiss is granted.

I would ask Mr. Fischler to prepare a proposed order and to submit it to Ms. Young for her examination and present it to this Court.

MS. YOUNG: Thank you, Your Honor.

THE COURT: Thank you.

Ms. Young, would you also place a formal appearance within the record within a week's time.

MS. YOUNG: Yes.

THE COURT: Thank you.

(Proceedings adjourned at 4:43 p.m.)

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-1716

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HELEN JEAN GUERCIO,
Plaintiff-Appellant,

v.

HONORABLE GEORGE BRODY, JUDGE, UNITED STATES BANKRUPTCY COURT, and the HONORABLE JOHN FEIKENS, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, sued individually and in their official capacities,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed April 1, 1987

Before: LIVELY, Chief Judge; KEITH and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. This case requires us to draw a line between the administrative and the judicial acts of federal judges. The sole question we address on appeal is whether the doctrine of absolute judicial immunity shields federal judges from any liability for wrongful employment practices.

The District Court dismissed the case on the basis of absolute judicial immunity. In light of our interpretation of the well-settled law that the doctrine of absolute immunity does not extend to the non-judicial acts of judges, we hold that judicial immunity does not apply to the personnel decisions at issue here. We therefore reverse and remand the case to the District Court.

I.

Helen Guercio, the former personal and confidential secretary to Bankruptcy Judge Brody of the Eastern District of Michigan, brought a civil action against Judge Brody and Judge Feikens, Chief Judge of the U.S. District Court for the Eastern District of Michigan, in their individual and official capacities for alleged wrongful termination of her employment. Plaintiff seeks compensatory and punitive damages against both judges in their individual capacities for allegedly discharging her in violation of her First Amendment free speech rights. In addition, plaintiff seeks reinstatement to her former position or a comparable one with back pay and other employment benefits allegedly due.

Defendants moved to dismiss or for summary judgment, and the District Court dismissed plaintiff's amended complaint on the ground that plaintiff's claims are barred by the doctrine of absolute judicial immunity.

The facts of this case, as alleged in the complaint and affidavits of record, lead us through an unfortunate chapter in the history of the U.S. Bankruptcy Court for the Eastern District of Michigan—a period in which Ms. Guercio asserts that she played a central role in exposing corruption in the Bankruptcy Court.

According to the allegations, Guercio was hired in January 1979 by Judge Brody to serve as his secretary. From October 1979 through June 1981, Guercio made various disclosures concerning corruption in the Bankruptcy Court. She

revealed, for example, that the Bankruptcy Court's system of random case assignments was being manipulated. These disclosures eventually led to the resignation of a bankruptcy judge as well as the criminal convictions of an attorney and bankruptcy court clerk.

As part of this chain of events resulting from her disclosures, Guercio alleges that the Judicial Council of the Sixth Circuit intervened and placed the Bankruptcy Court in virtual receivership. The Judicial Council stated in an order dated May 6, 1981:

> The Council concludes that the effective and expeditious administration of the business of the courts within this circuit requires that the administration of the Bankruptcy Court for the Eastern District of Michigan be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision should include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court.

By an order of May 18, 1981, the judges of the U.S. District Court for the Eastern District of Michigan directed Chief Judge Feikens to assume supervisory responsibility for the Bankruptcy Court pursuant to the earlier order of the Judicial Council of the Sixth Circuit.

During the summer of 1981, Guercio circulated articles to the press and others from many years before concerning a lawyer who had recently been nominated to fill the vacancy on the Bankruptcy Court. The articles supposedly disclosed that the nominee had earlier been nominated for the position of U.S. Attorney in 1969 but had withdrawn when it was disclosed that he had represented reputed organized crime figures.

With the approval of Chief Judge Feikens, Judge Brody fired Guercio on October 16, 1981.

II.

The central issue in this case is whether Judges Brody and Feikens were carrying out a judicial act in firing Guercio. The Supreme Court in *Stump v. Sparkman,* 435 U.S. 349 (1978), set forth a two-pronged test for determining whether an act by a judge is a "judicial" one. The first element relates to the "nature of the act itself, *i.e.*, whether it is a function normally performed by a judge." 435 U.S. at 362. The second element concerns the "expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Id.*

Applying the *Stump* test, we believe that the actions of Judges Feikens and Brody clearly fall outside a protected judicial act. We follow generally the reasoning of the Seventh Circuit's recent decision in *McMillan v. Svetanoff,* 793 F.2d 149 (7th Cir.), *cert. denied,* 107 S.Ct. 574 (1986), which addressed this issue in the context of a state judge firing a court reporter. In that case the court stated in pertinent part:

> Hiring and firing of employees is typically an administrative task. It involves decisions of a personal rather than impartial nature, which is integral to judicial decisionmaking. The decision to fire the plaintiff did not involve judicial discretion; in other words, the judge did not utilize his education, training, and experience in the law to decide whether or not to retain plaintiff. The administrative act of firing the plaintiff will not assist the judge in interpreting the law or exercising judicial discretion in the resolution of disputes. Certainly the court reporter assists the judge in his or her judicial capacity, *but so does everyone else employed within the judge's chambers*—the secretary, bailiff, law clerk, court reporter, probation officer, clerk of court, janitor—

> *they all assist in the smooth operation of the judicial process.*

793 F.2d at 155 (emphasis added).

See also Forrester v. White, 792 F.2d at 647, 663 (7th Cir. 1986) (Posner, J., dissenting) ("Judges have both judicial and executive functions. Hiring and firing subordinates are executive functions.")

The crucial mistake in the position adopted by the District Court and argued by defendants is that it conflates official acts of judges into judicial acts and seeks to extend judicial immunity to this broader class of official acts. For the purpose of absolute immunity analysis, this distinction is critical: only judicial acts are cloaked with absolute immunity. *See Stump,* 435 U.S. 349 (1978). Judges may perform many official acts which are not judicial acts. *See, e.g., Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719 (1980) (in promulgating bar code state Supreme Court acted in legislative capacity and not entitled to judicial immunity).

The Supreme Court recognized this fundamental distinction over a century ago in *Ex Parte Virginia,* 100 U.S. 339 (1879). This case involved a county judge indicted for racial discrimination in directing the selection of a jury venire for the county's courts. The judge argued that he could not be prosecuted by performing the judicial act of selecting the venire. The Court rejected the judge's argument in language in harmony with our present case:

> *Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent.* Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is

> not a judicial act. . . . It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, & c. Is their election or their appointment a judicial act?

100 U.S. at 348 (emphasis added).

In this case the District Court committed the same kind of error that the Supreme Court describes in *Ex Parte Virginia*. It confused an administrative or ministerial action with a judicial act. The District Court reasoned that although "the actions of Judge Feikens and Judge Brody were not actions that were taken in the courtroom under the normal advocacy proceedings . . . we believe that the actions of the Judges, whether correct or not, were done within their capacities as Judge of the United States District Court and Judge of the United States Bankruptcy Court for this district." Joint Appendix at 38.

The government argues that Judges Brody and Feikens were performing judicial acts in firing Guercio. It is argued on Judge Feikens' behalf that since Judge Feikens was acting pursuant to an order of the Judicial Council of the Sixth Circuit in approving the firing of Guercio, "Judge Feikens was performing an act by virtue of his judicial capacity." Brief for Appellees at 19. It is also contended that "Judge Brody approached Chief Judge Feikens with the expectation that the latter, as court-ordered receiver of the Bankruptcy Court, would review this matter." *Id.* Defendant argues that in the case of Judge Feikens the conjunction of these two factors satisfies the test under *Stump*.

With respect to Judge Brody, defendants highlight various facts as the basis of immunity: (1) Guercio was hired by Judge Brody pursuant to 28 U.S.C. § 156(a) (1982) which gives a

bankruptcy court judge the authority to employ a secretary; (2) as Judge Brody's confidential secretary, Guercio acted as Judge Brody's "alter ego"; and (3) Judge Brody "severed this confidential relationship with Ms. Guercio in order to improve both his and the Bankruptcy Court's ability to function more effectively and harmoniously." Brief for Appellees at 18-19.

Under these arguments, we see no principled limit to defendants' request for immunity. Under the standard urged by defendants, the doctrine of judicial immunity would sweep far too broadly to cover with absolute immunity the actions of the judicial councils of the federal courts of appeals — despite the fact that those councils plainly have authority over the "nonjudicial activities of the courts of appeals." 28 U.S.C. § 332(e)(1) (1982). Moreover, the doctrine as argued by defendants would also cover hiring and firing decisions of federal judges even though these are administrative decisions.

Other courts, in addition to the Seventh Circuit in *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir.), *cert. denied*, 107 S.Ct. 574 (1986), have agreed that decisions by judges in the personnel context are not judicial acts. *See, e.g., Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982) (screening decisions by judicial selection panel comprised of judges involve "executive" acts); *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D.N.C. 1983) (judge's appointment of magistrates ministerial act), *rev'd on other grounds*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S.Ct. 228 (1985); *Goodwin v. Circuit Court*, 729 F.2d 541, 549 (8th Cir. 1984) (county judge's decision to transfer hearing officer not "official judicial act" but rather "administrative personnel decision"); *Clark v. Campbell*, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981) (county judge, in hiring or firing county employees, exercises administrative and ministerial, not judicial, function). *But see Forrester v. White*, 792 F.2d 647 (7th Cir. 1986) (state judge's alleged wrongful discharge of probation officer entitled to absolute immunity).

This Court has been reluctant to extend the doctrine of judicial immunity to contexts in which judicial decisionmaking is not directly involved. In *Lynch v. Johnson,* 420 F.2d 818 (6th Cir. 1970), a member of a county "fiscal court" sued a county judge, who was serving *ex officio* as the presiding officer, for forcibly removing him from a meeting and jailing him. The Court concluded that the "fiscal court" was not an "ordinary judicial tribunal" and instead could best be characterized as a body through which the "affairs of the county are managed" with powers that are "legislative and administrative" in nature. 420 F.2d at 820. In light of the functions of the "fiscal court," the Court held that the defendant judge was not performing a judicial act during the meeting at issue and was therefore not entitled to the defense of judicial immunity.

In *King v. Love,* 766 F.2d 962 (6th Cir.), *cert. denied,* 106 S.Ct. 351 (1985), an individual who was mistakenly charged with driving while intoxicated brought a civil action against a city court judge after he was jailed for contempt, and then allegedly through the judge's actions, arrested again. The complaint alleged, first, unlawful incarceration by the judge, and, second, illegal arrest by the judge and police officers. The Court held that the incarceration claim was barred by judicial immunity. The Court explained, "Since the Memphis City Court had subject matter jurisdiction over the driving while intoxicated charge against King and since incarcerating King for contempt of court was a judicial act, King may not sue Judge Love for damages stemming from the March 4, 1980 incident." 766 F.2d at 968. The Court held, however, that the illegal arrest claim was not barred by judicial inmunity since on the facts of the case it was not a judicial act.

The Court stated that "the act of deliberately misleading officers who are to execute a warrant about the identity of the person sought well after the warrant has been issued" is not a judicial act. *Id. See also Sevier v. Turner,* 742 F.2d 262,

272 (6th Cir. 1984) (county juvenile court judge's acts initiating criminal prosecution and civil contempt proceeding against father in arrears on child support payments "nonjudicial acts" and judge therefore not immune).

We conclude that a proper application of the *Stump* test requires that the firing of Guercio be deemed a nonjudicial act. The firing of a confidential and personal secretary is hardly the "type of act normally performed *only* by judges." *Stump,* 435 U.S. at 362 (emphasis added). Members of the judicial, legislative, and executive branches routinely engage in the task of hiring and firing confidential personnel. This is an administrative act common to all branches of government and the private sector, not "the type of act normally performed only by judges." Furthermore, the expectations of the parties in this case are that personnel/administrative matters are involved, not judicial acts.

The basic problem with defendants' standard extending immunity to Judges Brody and Feikens for firing Guercio is that it would not serve a central underlying purpose of judicial immunity: promoting fearless and independent decisionmaking by the judiciary. This rationale for judicial immunity was firmly established at the common law.[1] An early seventeenth century opinion

> laid down [the principle] that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself, and it was observed that if they were required to answer otherwise, it would "tend to the scandal and subversion of all justice, and those who are the most sincere, would not be free from continual calumniations."

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[1]For an extensive discussion of the common law origins of the doctrine, *see Pulliam v. Allen,* 466 U.S. 522 (1984).

Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347-48 (1872) (quoting *Floyd v. Barker*, 77 Eng. Rep. 1305 (1607)).

An 1868 opinion by one of the judges of the Court of Exchequer succinctly stated the purpose of judicial immunity:

> "It is essential in all courts that the *judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear.* This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences."

Bradley v. Fisher, 80 U.S. (13 Wall.) at 350 n. (quoting *Scott v. Stansfield*, 3 L.R. Ex. 220 (1868) (emphasis added)).

The Supreme Court, which established the doctrine of judicial immunity in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872),[2] has repeatedly underlined its importance as a safeguard for judicial decisionmaking.[3] In *Pierson v. Ray*, 386

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[2]The Supreme Court in *Bradley* held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 80 U.S. (13 Wall.) at 351.

[3]*See, e.g., Butz v. Economou*, 438 U.S. 478, 512 (1978) ("Absolute inmunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."); *Dennis v. Sparks*, 449 U.S. 24, 31 (1980) (judicial immunity arose to permit judges to decide cases "without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption"); and *Ferri v. Ackerman*, 444 U.S. 193, 203-04 (1979) (immunity helps "forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion").

U.S. 547, 554 (1967), which held that the doctrine retained its force in Section 1983 suits, the Supreme Court stated:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. *Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.* (emphasis added.)

This case does not implicate this central underlying purpose of the doctrine of judicial immunity. The integrity and independence of judicial decisionmaking is in no way impaired if judges are called to account for their personal decisions. Liability for wrongful personnel decisions would not have a chilling effect on the judicial decisionmaking process. Although a judge may exercise discretion and judgment in firing a secretary, it is not the kind of discretion directly connected to independent decisionmaking in the adjudication process which is a paramount concern of the judicial immunity doctrine.[4]

By limiting the application of the doctrine of absolute judicial inmunity in this case, we are giving effect to the principle affirmed by the Supreme Court in *Butz v. Economou*, 438 U.S. 478, 506 (1978):

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:

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[4]For a useful discussion of the underpinnings of the doctrine and citations of related cases, see Note, *What Constitutes A Judicial Act for Purposes of Judicial Inmunity?*, 53 Fordham L. Rev. 1503 (1985).

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it."

(citing *United States v. Lee*, 106 U.S. 196, 220 (1882)).

Conclusion

Accordingly, we reverse the judgment of the District Court based on the doctrine of absolute judicial immunity and remand the case for further proceedings. We intimate no view regarding the First Amendment balancing issue calling for consideration of *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 561 U.S. 138 (1982), or the doctrine of qualified immunity because those issues were not addressed by the District Court and the record is not now adequate to address them on appeal.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-1716

HELEN GUERCIO, PLAINTIFF-APPELLANT

v.

GEORGE BRODY AND JOHN FEIKENS,
DEFENDANTS-APPELLEES

[FILED July 17, 1987]

ORDER

Before: Lively, Chief Judge, Engel, Keith, Merritt, Kennedy, Martin, Jones, Krupansky, Wellford, Milburn, Guy, Nelson, Ryan, Boggs and Norriss, Circuit Judges

A majority of the judges of this court in regular active service have voted for rehearing en banc of this appeal as to appellee John Feikens only. Pursuant to Sixth Circuit Rule 14, it is hereby ORDERED that the previous opinion and judgment of this court as to appellee John Feikens only is hereby vacated, the mandate as to that part of the judgment is stayed, and that part of the case is restored to the active docket as a pending appeal.

The clerk will direct the parties to file supplemental briefs as to John Feikens only and will schedule this case for oral argument as soon as practicable.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-1716

HELEN GUERCIO, PLAINTIFF-APPEALLANT

v.

GEORGE BRODY AND JOHN FEIKENS,
DEFENDANTS-APPELLEES

[FILED July 17, 1987

ORDER

Before: Lively, Chief Judge, Keith and Merritt, Circuit Judges

The court having received from appellee George Brody a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

No. 85-1716

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HELEN GUERCIO,

Plaintiff-Appellant,

v. ORDER

GEORGE BRODY; JOHN FEIKENS,

Defendants-Appellees.

BEFORE: LIVELY, Chief Judge; ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, MILBURN, GUY, NELSON, RYAN, BOGGS and NORRIS, Circuit Judges.

On July 17, 1987, the court entered an order in this case noting that a majority of the judges in regular active service had voted for rehearing en banc of this appeal as to Appellee, John Feikens only. The order went on to state, reciting Sixth Circuit Rule 14, that the previous opinion and judgment of this court as to Appellee John Feikens was vacated and the mandate stayed, with the Feikens portion of the case restored to the active docket as a pending appeal.

On January 12, 1988, the Supreme Court of the United States issued its decision in Forrester, petitioner v. Howard Lee White, respondent, published at 56 U.S. Law Week 4067. Upon consideration of the decision of the Supreme Court this court vacates its order of July 17, 1987, above referred to, and reinstates its decision in this action filed April 1, 1987. That

decision reversed the judgment of the district court and remanded the case for further proceedings. In that decision, this court noted that the district court had considered only the defense of absolute immunity, a ruling which we reversed, and had not considered other issues presented in the case. We noted specifically that the district court had not considered the doctrine of qualified immunity although it had been put forward as an alternate defense.

Upon this remand the district court will consider the entire case in light of the Supreme Court's decision in Forrester v. White and consider the remaining issues in light of Forrester v. White and this court's reinstated decision of April 1, 1987.

Judge Wellford opposes remanding this case to the district court.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

89-1146

HELEN GUERCIO,

Plaintiff-Appellee,

v.

GEORGE BRODY,

Defendant-Appellant,

JOHN FEIKENS,

Defendant.

Before FRIEDMAN, ARCHER and MICHEL, Circuit Judges.

ORDER

Helen Jean Guercio, after being dismissed as the confidential secretary to former bankruptcy judge George Brody, brought a civil action for damages against Judge Brody and John Feikens, then Chief Judge of the United States District Court for the Eastern District of Michigan. Guercio's suit against Judges Brody and Feikens (defendants) claimed infringement of her First Amendment rights because her termination allegedly occurred in retaliation for her public speech. She sought compensatory and punitive damages against the defendants in their individual capacities and reinstatement and back pay from the defendants in their official capacities.

Initially the suit was dismissed on the grounds of absolute judicial immunity, but this decision was reversed in Guercio v. Brody, 814 F.2d 1115 (th Cir.), reh'g granted in banc, 823 F.2d 166 (1987), re-reported 859 F.2d 1232 (6th Cir.), cert. denied, 108 S.Ct. 749 (1988).[1] On remand, Judge Brody moved to dismiss Guercio's second amended complaint on qualified immunity grounds. The district court denied the motion and this appeal followed.[2] Judge Brody also filed an appeal to the Court of Appeals for the Sixth Circuit, which is pending in that court.

Judge Brody, citing the Supreme Court's decision in United States v. Hohri, 482 U.S. 64, 75-76 (1987), contends that jurisdiction lies in this court under 28 U.S.C. § 1295(a)(2) (1982) because the district court's jurisdiction was based in part on a Little Tucker Act claim. See 28 U.S.C. § 1346(a)(2) (1982). We conclude, however, that Guercio's second amended complaint does not state a claim under that Act.

While the Tucker Act (including the Little Tucker Act) provides "consent of the United States to be sued. . . for the classes of claims described in the Act," United States v. Mitchell, 463 U.S. 206, 215 (1983), "the Tucker Act 'does not create any substantive right enforceable against the United States for money damages."' Id. at 216 (quoting United States v. Mitchell, 445 U.S. 535, 538 (1980)); United States v. Testan, 424 U.S. 392, 398 (1976). Some other source of a substantive right to money damages must be found. Mitchell,445 U.S. at 538.

In addition to the relief against the defendants in their individual capacities requested in the second amended complaint, Guercio seeks:

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[1] Appeal to the Sixth Circuit was taken prior to the Supreme Court decision in United States v. Hohri, 482 U.S. 64 (1987).

[2] Appeal was taken from the order denying qualified immunity under the authority of Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

A mandatory injunction ordering defendants to reinstate plaintiff to her former position or an equivalent position, with all compensatory damages, employment rights, privileges, pay and benefits due her, relating back to the date of the illegal and unconstitutional termination of plaintiff's employment. Plaintiff waives all money claims against the defendants in their official capacities and against the United States in excess of . . . $9,999.00. However, plaintiff does not waive any such claims against defendants Brody and Feikens in their individual capacities.

If we assume that this provision is intended to be a claim for back pay against the United States, Guercio has identified no substantive provision entitling her to such money damages.[3]

We have examined the Back Pay Act, 5 U.S.C. § 5596 (b) (1982), which authorizes retroactive recovery of wages whenever "[a]n employee of an agency" has undergone "an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or part of" the compensation to which the employee is otherwise entitled, to see if it could cover Guercio. We conclude that it does not because she is not an employee of an agency within the meaning of the Back Pay Act.

While an "agency" is defined to include "the Administrative Office of the United States Courts," 5 U.S.C. § 5596(a)(2) (1982), Guercio is not considered to be such an

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[3] Guercio has not directly claimed money damages against the United States because the United States has not been made a party to this proceeding. The Tucker Act by its terms is limited to suits against the United States. See 28 U.S.C. § 1346(a) (1982); also see Van Drasek v. Lehman, 762 F.2d 1065, 1069-70 (D.C. Cir. 1985). In view of our decision, however, that no source of a —substantive right enforceable against the United States for money damages— has been set forth in the second amended complaint, we need not decide whether the United States as a proper party defendant could be named at this stage.

employee. See 28 U.S.C. §§ 601, et seq.[4] Rather, she is an employee of the court to which she was appointed and which exercised hiring authority over her. 28 U.S.C. § 609 (1982). In this connection, 28 U.S.C. § 772 (1982) provides that "[b]ankruptcy judges may appoint necessary other employees, including . . . secretaries."

Since the Back Pay Act is inapplicable to the confidential secretary of a bankruptcy judge, Guercio cannot avail herself of that Act to claim a substantive right to the payment of money against the United States. See Mitchell, 445 U.S. at 538; Testan, 424 U.S. at 398. Moreover, we are not aware of any other statutory or regulatory authority that might entitle a person in Guercio's position to an award of back pay and none has been cited in the complaint.

In view of the foregoing, the district court did not have jurisdiction over a claim satisfying the requirements of the Little Tucker Act, and for that reason we are without jurisdiction to hear this appeal. Cf. United States v. Hohri, 482 U.S. at 75-76.

Accordingly, IT IS ORDERED that the appeal is dismissed.

FOR THE COURT

Date: 9/6/89

Glenn Archer, Jr.
Circuit Judge

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[4] 28 U.S.C. § 602 (1982) provides the Director of the Administrative Office with the authority to "appoint and fix the compensation of necessary employees of the Administrative Office." Separately, 28 U.S.C. § 609 (1982) provides that "[t]he authority of the courts to appoint their own administrative or clerical personnel shall not be limited by any provisions of this chapter."

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HELEN JEAN GUERCIO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 84-CV-4736-DT
	)	
GEORGE BRODY	)	
and	)	
JOHN FEIKENS,	)	
	)	
Defendants.	)	
	)	

SECOND AMENDED COMPLAINT
FOR DAMAGES AND INJUNCTIVE AND
DECLARATORY RELIEF

Jurisdiction

1. This action is brought pursuant to the First Amendment to the United States Constitution and Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Jurisdiction is founded upon 28 U.S.C. Sections 1331, 1343, and 2201. Plaintiff further invokes the pendent jurisdiction of this Court.

2. This is a second amended complaint for monetary, injunctive and declaratory relief, based on plaintiff's claims that she was discharged from her employment as a legal secretary with the Bankruptcy Court for the Eastern District of Michigan in violation of her First Amendment rights. While the matter in controversy exceeds $10,000.00, plaintiff waives all monetary claims against the United States in excess of $9,999.00, but does not waive such claims against defendants Brody and Feikens individually.

Parties

3. Plaintiff Helen Jean Guercio is a citizen of the United States and a resident and citizen of the State of Michigan.

4. Defendant George Brody was at all times relevant to this complaint a Judge of the Bankruptcy Court for the Eastern District of Michigan. He had general authority to hire legal secretaries. Defendant Brody, upon information and belief, resides in Southfield, Michigan. He is sued in both his individual and in his official, administrative capacities.

5. Defendant John Feikens was at all times relevant herein the Chief Judge of the United States District Court for the Eastern District of Michigan. At all relevant times herein, the Bankruptcy Court, in a transitional state under the 1978 Bankruptcy Act, 28 U.S.C. Sec. 151, et seq., was under the authority of the United States District Court. At all times relevant herein, defendant Feikens was responsible for the administration of the Bankruptcy Court operations, including personnel administration. Defendant Feikens, upon information and belief, resides in Ann Arbor, Michigan. He is sued in both his individual and administrative capacities.

Factual Allegations

6. Plaintiff Guercio was formerly employed by defendant Brody in January 1979 as a legal secretary for his office within the Bankruptcy Court for the Eastern District of Michigan ("Bankruptcy Court"). She worked in that capacity for almost three years, until October 1981.

7. Plaintiff's principal responsibility was to provide defendant Brody with the legal secretarial services he required in his capacity as a federal bankruptcy judge. During her entire career, and included her tenure in defendant Brody's office, plaintiff performed her duties in a competent and professional manner to the satisfaction of all who supervised her or all to whom she reported.

8. In October 1979, Plaintiff learned from other Bankruptcy Court personnel and attorneys with whom she had a professional relationship that the Bankruptcy Court's system of random case assignments was being manipulated. The system was supposed to randomly assign each bankruptcy case as it was filed to one of three Bankruptcy Court judges, including defendant Brody. The goal of the "blind draw" system was the prevention of "judge-shopping" by attorneys. Because of the manipulation, the majority of large bankruptcy cases were assigned to Bankruptcy Judge Harry Hackett. The Clerk's Office, primarily Clerk Kathy Bogoff, assigned bankruptcy cases involving corporate reorganizations under Chapter 11 (11 U.S.C. Sec. 1101, et seq.) to Judge Hackett. Hackett would in turn award generous attorney's fees to a lawyer who primarily handled these cases, Irving August.

9. During the same period of time, plaintiff also learned that the Chief Clerk of the Bankruptcy Court, William Harper, was abusive toward women, accepted favors from lawyers, was often drunk on the job, and engaged in patronage activities in the Clerk's Office. Harper, who was Bogoff's supervisor, was formerly the manager for the United States District Court for the Eastern District of Michigan, under the direction of defendant Feikens.

10. In December 1979, plaintiff called defendant Feikens on a "hotline" established for internal matters and informed him about the manipulation of the random case assignment system in the Bankruptcy Court. Plaintiff also informed defendant Feikens of Harper's improper and illegal conduct. Defendant Feikens stated to plaintiff that he could do nothing about plaintiff's allegations.

11. In May 1980, plaintiff informed William Trencher and Milner Benedict of the Administrative Office of the United States Courts ("AO") in Washington, D. C., about the problems with the random assignment system and about Harper's improper and illegal conduct. Plaintiff and others reported to the AO throughout the summer of 1980 about the problems in the

Bankruptcy Court, but, upon information and belief, there was little the AO could do without an order from defendant Feikens allowing an investigation, and defendant Feikens withheld that necessary consent.

12. In June 1980, plaintiff informed defendant Brody about the intentional and improper manipulation of the system of random assignment of cases. Defendant Brody indicated that he did not belief plaintiff's assertions.

13. Upon information and belief, in September 1980, defendant Feikens forward to the AO a complaint made by an Assistant United States Attorney concerning a sexist remark made to her by Hackett. In October 1980, defendant Feikens agreed to issue an order allowing AO investigators to begin an investigation of the matter.

14. The AO conducted an investigation relying in substantial part upon information provided by plaintiff. Based on its investigation, the AO made certain charged against Harper, including sexual harassment of employees of the Bankruptcy Court, intoxication on the job, abusive behavior, patronage activities in the Clerk's Office, and improper receipt of gifts. The investigation also disclosed evidence of possible criminal violations by Harper and others involving allegations of manipulation of case assignments and improper dealings with attorneys or parties before the Bankruptcy Court. The AO referred evidence of possible criminal conduct to the United States Attorney, including information concerning the illegal manipulation of the case assignments conducted by Hackett, August and Bogoff.

15. In January 1981, plaintiff learned that Harper had illegally bought property from a bankruptcy estate using a false name. The transaction was in direct violation of the law. In or about May 1981, plaintiff provided to the Federal Bureau of Investigation ("FBI") information about Harper's transactions. Subsequently, Harper was convicted of Prohibited Purchase of Property from the Estate of a Bankrupt by a Court Officer in

violation of 18 U.S.C. Sec. 154.1

16. On or about June 22, 1981, the Michigan Merit Screen Commission found Hackett unfit to remain on the Bankruptcy Court bench after twenty-five years of service. On June 24, 1981, U. S. Circuit Court Chief Judge George Edwards ruled against Hackett. On the same day Hackett resigned.[5]

17. Shortly after Hackett resigned, a committee of federal district court judges nominated attorney George E. Woods to replace Hackett as a Bankruptcy Judge. A three–attorney screening committee of Michigan attorneys approved the judges' nomination of Woods. Woods' nomination generated much public controversy, was widely criticized and defended, and was the subject of extensive media coverage.

18. In the summer of 1981, plaintiff learned that nominee Woods had, in 1969, been nominated to become a United States Attorney, but had had his nomination withdrawn after Woods' representation of and contacts with reputed organized crime or racketeering figures was publicized.

19. In the summer of 1981, plaintiff discovered old newspaper articles describing the controversy over Woods' 1969 nomination for U. S. Attorney and its subsequent withdrawal. Plaintiff informed defendant Brody about the newspaper articles she had discovered regarding Woods and that she intended to distribute the articles to, among others, the committee considering Woods for the Bankruptcy Court judgeship. Defendant Brody neither requested that plaintiff not disclose these articles to anyone, nor did he express any concern that her disclosure would in any way affect her ability to perform her work.

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[5] On March 19, 1982, bankruptcy attorney August and court clerk Bogoff were indicted for Conspiracy to Defraud (18 U.S.C. Sec. 317), Obstruction of Justice (18 U.S.C. Sec. 1503), Receipt of Gratuities (18 U.S.C. 201(9)), and Bankruptcy Fraud (18 U.S.C. Sec. 152). Bogoff

20. Plaintiff sent copies of the 1969 newspaper articles she had discovered concerning nominee Woods to the FBI, the AO, the judges' nominating committee, the United States Attorney's Office, and various newspaper reporters.

21. Thereafter, Woods informed defendant Brody that, because plaintiff had distributed the 1969 newspaper articles, Woods would, if appointed, refuse to work with defendant Brody unless plaintiff's employment were terminated. Defendant Brody thereupon discussed with defendant Feikens the demand by Woods that plaintiff be fired.

22. All of the alleged events during which defendants Brody and Feikens learned of the fact that plaintiff had distributed the 1969 articles on nominee Woods occurred during the period Woods was under consideration for appointment to the Bankruptcy Court.

23. Upon information and belief, Judge Feikens demanded that Judge Brody terminate plaintiff's employment in light of the above disclosures concerning Woods. On October 16, 1981, Judge Brody did terminate plaintiff's employment.
24. Defendants Feikens and Brody were motivated to effect and did effect plaintiff's termination solely because of her participation in exposing corruption in the Bankruptcy Court and her distribution of the 1969 newspaper articles critical of the nominee who was being considered to replace the judge whose corruption had been exposed by plaintiff. At all times relevant herein, defendants were aware of plaintiff's participation in exposing corruption in the court and of her distribution of articles relevant to the Woods nomination.

25. Plaintiff never personally criticized nominee Woods and her activities concerning Woods were limited solely to disclosures of newspaper articles containing information relevant to concerns of the nominating committee. The disclosures were made in good faith, and accomplished entirely on her own time with her own resources.

26. Plaintiff's distribution of the newspaper articles had not caused any disruption in her performance of her duties or her ability to work with others in the course of performing her duties. Plaintiff's duties were such that she had very little contact with the staff of the Bankruptcy Court. Plaintiff's office was on the tenth floor, whereas the staff worked on the first floor. With respect to Woods, no disruption of the workplace could have occurred, since Woods' nomination was still pending, and he had not been appointed to or had any official connection with the Bankruptcy Court at the time plaintiff was fired.

27. The disruption in the Bankruptcy Court workplace, if any, that may have resulted from plaintiff's disclosures regarding the manipulation of the random assignment system and other disclosures of illegal activity, was minor, and such disruption, if any, was in fact caused only by those associated with or sympathetic to the persons whose illegal activities plaintiff had participated in exposing. Such disruption, if any, played no part in defendants' motivation in terminating plaintiff's employment.

28. On information and belief, in further retaliation for plaintiff's exposures of illegalities and her distribution of the 1969 articles concerning Woods, defendant Feikens, shortly after terminating plaintiff's employment, caused two FBI agents to come to plaintiff's home at night to question plaintiff about her distribution of the newspaper articles.

Cause of Action
(Violation of Plaintiff's First Amendment Rights)

29. Plaintiff realleges and incorporates herein each and every allegation contained in paragraphs 1 through 28 of the complaint, and additionally alleges as follows.

30. Plaintiff's disclosures described in paragraphs 8 through 27 hereof are protected activity under the First Amendment to the United States Constitution. Plaintiff's exercise

of free speech did not violate the terms and conditions of her employment, and therefore by making said disclosures plaintiff engaged in no misconduct.

31. By denying plaintiff her rights under the First Amendment to speak on matters of public concern, defendants Feikens and Brody deprived plaintiff of her rights and privileges secured by the Constitution, and their acts were intentional, unreasonable and taken in bad faith, or alternatively in disregard of their duties.

32. In acting as alleged herein, defendants terminated plaintiff's employment arbitrarily, without just cause, and in violation of fundamental public policies of law, because, inter alia, the retaliatory firing constitutes an unconstitutional deprivation of plaintiff's First Amendment right to express herself on matters of clear public concern. Notwithstanding the knowledge as alleged, defendants acted oppressively, maliciously, fraudulently and outrageously towards plaintiff, with conscious disregard for her known rights and with the intention of causing, or willfully disregarding the possibility of causing, unjust and cruel hardship to plaintiff. In so acting, defendants intended to and have vexed, injured and annoyed plaintiff.

33. As a direct and proximate result of the defendants' actions alleged herein, plaintiff sustained substantial economic losses, including her past and future compensation, and other economic benefits, and incurred litigation expenses. Plaintiff also sustained embarrassment, humiliation, mental and emotion distress and discomfort, and anguish, all to her detriment and damage in amounts not fully ascertained but within the jurisdiction of this Court and provable at the time of trial, and which warrant exemplary damages.

Prayer for Relief

WHEREFORE, the premises considered, plaintiff prays for judgment against defendants and each of them as follows:

1. A declaration that defendants' dismissal of plaintiff from her employment was illegal, unconstitutional, arbitrary and without just cause, and in retaliation against plaintiff for her exercise of her rights secured by the First Amendment to the United States Constitution.

2. A mandatory injunction ordering defendants to reinstate plaintiff to her former position or an equivalent position, with all compensatory damages, employment rights, privileges, pay and benefits due her, relating back to the date of the illegal and unconstitutional termination of plaintiff's employment. Plaintiff waives all money claims against the defendants in their official capacities and against the United States in excess of in excess of $9,999.00. However, plaintiff does not waive any such claims against defendants Brody and Feikens in their individual capacities.

3. A judgment against defendants, jointly and severally, in their individual capacities, awarding compensatory damages to plaintiff in the amount of One Million Dollars ($1,000,000.00) to reimburse her for all salary and employment benefits lost to her as a result of defendants' violation of her rights under the First Amendment to the United States Constitution, and for injury to her professional career, to her reputation, and for the mental and emotional distress caused plaintiff by defendants.

4. A judgment against defendants, jointly and severally, in their individual capacities, awarding plaintiff One Million

Dollars ($1,000,000.00) in punitive damages for violation of her rights under the First Amendment to the United States Constitution.

5. An award of reasonable attorneys' fees and costs of this action.

6. Such other and further relief as this Court deems just and proper.

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Dated: June 20, 1988.